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IN THIS NUMBER

ARTHUR W. MACMAHON, co-author of *Federal Administrators* and *The Administration of Federal Work Relief*, traces the history of the recent movement of the Senate to widen its control over appointments and discusses the consequences that would follow such action.

ROBERT E. CUSHMAN, President of the American Political Science Association and chairman of the Special Committee on Civil Liberties of the Social Science Research Council, examines the constitutional, policy, and procedural questions involved in the congressional purge of three federal employees in 1943 and the efforts of the executive branch of the government to handle the problem of loyalty of federal employees.

DON K. PRICE, former Managing Editor of the *Review*, in a discussion of legislative-executive relationships in Great Britain and the United States suggests that the United States should not copy the classic parliamentary system that Great Britain seems to have abandoned.

Through experience in the Kentucky Department of Revenue and the Bureau of Business Research of the University of Kentucky, GLENN D. MORROW has had opportunity to gather the materials presented in his article on the supervision of county debts in Kentucky.

In his discussion of political ends and administrative means, DAVID M. LEVITAN, of the War Production Board, develops the thesis that administrative machinery and political and philosophical principles together determine the system of government of any country.

Reviewers: A pamphlet on functional organization charts is reviewed by CHARLES S. ASCHER, of the National Housing Agency . . . . GEORGE F. GANT, of the Tennessee Valley Authority, discusses bureaucracy in the field in his review of two recent reports . . . . LOUIS WIRTH, of the University of Chicago, reviews a volume in which thirty persons contribute to a discussion of collective enterprise . . . . KENNETH C. COLE, of the University of Washington, reviews a series of essays presented in a volume on regulatory administration.

Senatorial Confirmation

By ARTHUR W. MACMAHON

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FROM March 4, 1933, to the end of 1942—a decade—100,328 nominations were submitted to the Senate.[1] Of these, 58,912 were of commissioned officers in the armed forces. Postmasterships totaled about one-third, 33,966. The 7,450 civilian nominations (other than for postmasterships) included commissioned personnel in the Public Health Service and the Coast and Geodetic Survey and career positions in the Foreign Service. Making much of the routine senatorial clearance of these masses, but inconsistently and significantly pleading for more control of civilian administration, the Senate has been seeking to bring thousands of posts under confirmation. Its efforts have risen in a crescendo of incidents since 1937. Late in 1942 it tasted blood in a major wartime agency, the Manpower Commission. Twice in 1943—first in a general bill and then in two identical riders—it drove its demands to the House, failing only after a protracted conference deadlock. Such pressure calls for analysis.[2]

The McKellar Bill in 1943

BEFORE passing to the motives and the consequences of enlarged senatorial confirmation, it is useful to trace the double story of 1943 and then to review the earlier pieces of related legislation. The McKellar bill (S. 575) was introduced early in the 78th Congress. "It is nothing new," remarked its sponsor, "I have been introducing it for years." [3] The bill as introduced

> declared that any person holding an office or position in or under the executive branch of the Government of the United States (including Government-owned corporations) and receiving compensation at a rate in excess of $4,500 a year for his services in such office or position shall be deemed to be an officer of the United States, to be appointed by the President, by and with the advice and consent of the Senate, and shall not be deemed to be an inferior officer who may be appointed by the President alone or by the head of a department.

The terms of persons employed at such a rate and not hitherto confirmed were to expire not later than June 1, 1943. And a four-year term was prescribed for those who were appointed pursuant to the terms of the new bill. In the course of the hearings, Senator McKellar agreed to abandon this limitation, which he said was "unimportant," but he hoped the salary standard would be lowered to $3,800.

Referred to the Committee on the Judiciary, Senator McKellar's draft was considered by a special subcommittee of five, headed by Senator McCarran of Nevada. A hearing was held on February 11. The author of the bill seemed to confuse his role as visitor and proponent with that of chairman; Senator Wheeler was less juryman than prosecutor; altogether, the three witnesses against the bill had a bad time. In the face of the issues at stake, the seventy-odd printed pages of the record were pathetic for more reasons than Senator McKellar's

[1] *Civilian Nominations*—a booklet printed at the end of each session "for the use of the Secretary of the Senate." The totals are taken from the cumulative tabulation in the issue for the 78th Congress, 1st Session, to its recess on July 8, 1943.

[2] Professor Joseph P. Harris, now Lieut. Col. Harris of the Army School of Military Government, had in preparation on the eve of war an intensive monographic study of senatorial confirmation. It is hoped and assumed that this monograph will be published at some later date.

[3] 78th Congress, 1st Session, Senate Committee on the Judiciary, *Hearing before a Subcommittee on S. 575* (1943), p. 21.

misplaced spectacles and his hope that, at the age of seventy-four, fair-minded persons would acquit him "of wanting patronage for political purposes or any other purposes."[1] Anyway, he said, "I don't know any people in my state that want offices of any kind." The subcommittee reported McKellar's draft with slight changes to the whole committee on February 24.

Meanwhile, as early as February 19, the President had written to the presiding officer of the Senate "to express my unqualified opposition to this proposed legislation." The bill, he declared, "presupposes congressional responsibility for the operations of executive agencies," and he added that "an agency head is responsible for the success or failure of his program." Accountability would be "dissipated if responsibility for the appointment of employees is divided." Other grounds of objection were mentioned, including the delays already illustrated in the confirmation of Manpower posts paying over $4,500. "Confirmation of administrative, professional, and technical employees by a legislative body is the very antithesis of the merit system," wrote the President, and "would sweep away years of civil service progress." To these points of criticism it will be necessary to return in later paragraphs—especially to the President's trenchant remark that "determination of policy is not synonymous with the exercise of administrative discretion."[2]

Before reporting the bill on April 14 by a vote of 10 to 4, the full committee modified it drastically. In the end, to be sure, the provision for confirmation of all employees paid $4,500 a year or more was retained in the bill, subject to the exception of any person "appointed or promoted in accordance with the provisions of the civil-service laws and rules providing at the time of his appointment or promotion, for his acquiring a classified (competitive) civil-service status." Excepted also were artisans and craftsmen, the personnel of the Federal Bureau of Investigation, and persons "whose compensation is paid from the appropriation for the White House Office in the Executive Office of the President." On the other hand, the revised draft sought to list certain types of positions. In the words of the majority report, they were thought to comprise officers "whose duties involve policy-making functions."[3] The categories to be brought within confirmation were:

1. The heads, assistant heads, and head attorneys of the several departments and agencies of the government (including government-owned corporations).
2. The heads of bureaus, divisions, sections, and other subdivisions of such departments and agencies.
3. The heads and assistant heads of regional, area, or state offices of such departments or agencies.
4. All persons whose duties include the preparation or issuance of rules, regulations, or orders made or issued under authority of any Act of Congress or any executive order.
5. All persons whose duties include participation in conferences or discussions with persons from other departments or agencies, or with persons from other bureaus, divisions, sections, or other subdivisions of their own departments or agencies (other than with their own superiors), held for the purpose of determining the policies or methods to be followed in administering any of the functions of any department or agency or any bureau, division, section, or other subdivision thereof.

A minority report was tendered by Senator O'Mahoney for himself and Senators Ferguson and Langer.[4] This report accepted the principle of the revised bill apart from the salary limitation, which the minority complained had been put back at the last minute, after the whole committee had struggled fairly successfully with a listing of

[1] *Ibid.*, p. 10. The witnesses in opposition were from the U. S. Civil Service Commission, the National Civil Service Reform League, and the American Federation of Federal Employees. In addition, brief letters against the bill were filed by the National Federation of Federal Employees, the CIO, and the National League of Women Voters.

[2] The text of the letter was given in 89 *Congressional Record* 1213 (1943).

[3] 78th Congress, 1st Session, *Senate Report*, 180, Part 1.

[4] *Ibid.*, Part 2.

policy-determining types of posts. On May 11, Senator Hatch submitted "supplemental minority views." While endorsing the main minority statement, he expressed strong doubts. Fundamental legislation was perhaps needed, he said, but "it is suggested that the entire bill be recommitted to the Senate Committee on Civil Service; that full and complete hearings be held; and that such committee make such recommendations to the Senate as it may deem proper in view of all the complexities, uncertainties and confusion which now exist." [1]

When S. 575 as revised was taken up in the Senate on June 3, the main controversy was between the majority and minority versions of the bill, turning on the inclusion of the flat $4,500 limit on top of the classes of positions. Senator McKellar declared that the control must be made automatic. "Is it not true," he asked, "that the bureaucracies on which we are trying to place a slight check will determine who is a policy-making official and who is not, and therefore the law will be nugatory, unless we have some provision in the statute to do it?" [2] The O'Mahoney draft, he complained, "in the nicest, clearest, smoothest, most adroit way, would simply cut the life out of the bill." [3] By this the Senator meant less than the whole of the bill's life; for whereas he had been talking about 30,000 employees paid at the rate of $4,500 or more, now he merely claimed that the minority draft would "exempt 15,000 or 20,000 persons who otherwise would be subject to the law." [4] Senator O'Mahoney, for his part, claimed that the $4,500 limit "brings within the contemplation of confirmation employees who were never intended by the Constitution to be subject to confirmation" and that it would "entail upon the Senate such difficult and detailed work that it would be impossible of performance." [5]

Against such protests, the majority committee draft was adopted on June 7, by 43 to 22.[6] O'Mahoney then brought forward his perfected substitute. Apart from omission of the $4,500-and-above catch-all, it differed from the version that had just been adopted particularly in the phrasing of the categories (4) and (5). The first was revised to embrace "all persons whose duties include responsibility for final action in connection with the promulgation of rules, regulations, or orders. . . ." The second covered "all persons whose duties include responsibility for determining the policies to be followed in administering the functions of any department, agency, or subdivision. . . ." Well might Senator Lister Hill say of this purportedly cautious re-draft that anyone who read the letter of May 11 from the Civil Service Commission "will be persuaded that there is a good deal of doubt about the O'Mahoney substitute, as to exactly what it means, and how it might be interpreted or construed." [7] But it was not for this reason that the O'Mahoney substitute was rejected on June 14 by 32 to 42.[8] Likewise the motion to refer the bill to the Senate Committee on Civil Service, urged especially by Senators Hatch and Mead, lost by 22 to 47, and the McKellar bill was adopted by 42 to 29.[9]

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[1] *Ibid.*, Part 3, p. 13.

[2] 89 *Congressional Record* 5361 (1943).

[3] *Ibid.*, p. 5443.

[4] *Ibid.*, p. 5897. As a matter of fact, no accurate estimate of the numbers that would be affected by any draft of the bill was submitted by its proponents. *Senate Report 180*, Part 1, p. 4, gave a total, as of November 1, 1942, of 27,684 civilian posts under the executive branch paid $4,500 or more; but this did not segregate those in the competitive classified service who would be exempted under the committee bill. Both the majority and minority drafts dipped lower than the $4,500 level, but the numbers involved were not clear.

[5] *Ibid.*, p. 5356.

[6] *Ibid.*, p. 5501.

[7] *Ibid.*, p. 5896.

[8] *Ibid.*, p. 5907. Previously Lister Hill's attempt to exempt the TVA had failed, 15 to 58 (p. 5906).

[9] *Ibid.*, p. 5915. On July 14, 1943, the Civil Service Commission sent a letter of analysis and protest to Chairman Ramspeck of the House Civil Service Committee. Among other criticisms, it pointed out the limits of the language exempting civil-service employees: first, as to those given civil-service status noncompetitively by statute and by executive order; and, second, as to persons appointed under the war-service regulations.

The 1943 Riders

WITH the reference of S. 575 to the House Committee on Civil Service,[1] the Senate's exigency expressed itself in riders on the appropriation bills for war agencies (H.R. 2968) and for Labor–Federal Security (H.R. 2935). McKellarism reappeared in its simplest form in the rider which the Senate Committee on Appropriations attached to each bill: "No part of any appropriation contained in this act shall be available to pay the salary of any person at the rate of $4,500 per annum or more unless such person shall have been appointed by the President by and with the advice and consent of the Senate."

On July 3, by 302 to 29, the House voted not to recede from disagreement on the foregoing item.[2] Even Taber, ranking minority member on appropriations, said that "the provision is so drawn and worded that it is impossible of administration." Truly, the approaching recess in itself put a stark face against any unqualified requirement of confirmation. But Taber was prepared to compromise with the Senate. On July 7, when Cannon again moved that the House conferees be instructed not to recede, Taber proposed that the House should agree to an amended proviso. This lifted the salary standard to $5,500; it applied only to persons appointed after June 30, 1943; and it permitted leeway in the confirmation of those named after that date and before November 1. At this stage Minority Leader Martin and the Republicans seemed to be following Taber. The motion that would have cleared the way for his amendment failed by the close margin of 170 to 176.[3] But overnight the Republicans took second thought. On July 8 the mingled scruples and envy that had stiffened the House were again in full force. Only two bills remained in conference, hung up on the identical confirmation rider. "We have an understanding with the managers on the part of the Senate," Cannon said, "that they will abide by the action taken in the House here today." He added that if the House refused to adhere, its managers would have to yield. Moreover, in this "final showdown on a long and much-disputed issue," the decision on the war agencies measure would also settle the fate of the provision in the Labor-Federal Security Bill. Taber then brought up his compromise amendment, altered only by the exemption of the Office of Strategic Services. He estimated that the $5,500 limit would cover about 12,000 positions, with nominations coming to the Senate at the rate of 200 or so a month. In closing the debate against Taber's motion, Ludlow said: "I have very definite information that it is doubtful whether the President will sign the bill if this provision goes into it." The House, 69 to 260, stood its ground against compromise.[4] The effort to widen the field of confirmation was halted at least temporarily. But the portent of the effort was not dispelled.

Earlier Senate Forays, 1935–42

IT HAS been said that the balked attempts of 1943 were the projection of a number of lesser but largely successful demands during the preceding eight years to widen the control of the Senate over appointments. A brief review is appropriate.

At the outset of the work program in 1935 the emergency relief appropriation act was amended in the Senate on McCarran's motion to provide that any person exercising general supervision, or any state or regional administrator, paid more than $5,000 yearly, and not already employed under another law, must be named by the President and confirmed by the Senate. The disadvantaged presidential aides could not resist; the House leaders spluttered a little, tinkered a bit in conference, but accepted the proviso.

[1] Chairman Ramspeck said on July 3: "I have publicly announced that in due time the House Committee on the Civil Service will give everybody who is interested an opportunity to be heard on the legislation" (89 *Congressional Record* 7720 [1943]).

[2] *Ibid.*, p. 7219.

[3] *Ibid.*, p. 7460.

[4] *Ibid.*, p. 7575.

At a stroke, responsibility within the WPA was seriously compromised. Nor was the requirement ever shaken off. In 1936 the chairman of the House Appropriations Committee met defeat more than half way. "The Senate," he said, "will put the provision in the bill and will not recede." Omitted in 1938 by inadvertence, the requirement of confirmation was repeated in all the work relief appropriation acts through that of July 2, 1942, which further directed that "the Work Projects Administration shall continue to maintain in each state an office of state administration."

The gathering momentum of the Senate's push toward wider participation in appointments became evident in the 1937 Senate drafts of what became the reorganization act two years later. Senator Robinson's original version (S. 2700, 75th Congress, 3rd session, Sec. 203, introduced on June 23) was frightening in the breadth of the concept invoked: that all persons who were directly responsible to the heads of departments must be nominated by the President and confirmed by the Senate. Thus did the chairman of the Senate's Select Committee on Reorganization, who was likewise the Senate's leader, disregard the need for departmental cohesion as well as the extent to which bureau chiefs were already chosen through civil service.[1] The committee was understood even to be contemplating a flat salary limit above which confirmation would be required. Following Senator Robinson's death, however, the section in question was modified in the successive drafts (S. 2970, introduced August 16, 1937, and S. 3331, introduced January 27, 1938) sponsored by Senator Byrnes as the new head of the select committee. Notably, the requirement of presidential appointment and senatorial confirmation for all who were "directly responsible" to the departmental and agency heads was to apply "only if the President finds that such office or position is policy determining in character." This variation was accepted by the Senate but was soon dropped altogether on Byrnes' motion. "I do not believe the section is important," he said, adding that his canvass of the departments indicated that only about fourteen persons would be covered by its terms.[2]

Meanwhile, in isolated instances that gathered with cumulative force, the Senate was pushing and sometimes succeeding in its demands. In 1937, Senator Glass took umbrage when Frank Bane, as executive director of the Social Security Board, did not agree that a candidate favored by the senator was an "expert" suited for appointment outside of the civil service laws, as permitted by the Social Security Act.[3] So a Senate amendment about nomination and confirmation of "attorneys and experts" was put in the independent offices appropriation bill, along with an amendment to cut Bane's salary by $500.00 as a disciplinary measure. After weeks of disagreement, the House conferees yielded on both amendments. The names of fifty-odd attorneys and experts were submitted to the Senate and all were confirmed.

Especially was the Senate hitching the requirement of confirmation to particular salary standards. The act of September 1, 1937, that created the United States Housing Authority provided (Sec. 4, b) that "appointments to positions made under the provisions of this act, the salary of which is in excess of $7,500 per annum, shall be subject to confirmation by the Senate." On the reorganization of housing by executive order in 1942, this provision ceased to be effective. While it lasted only four posts occupied at any one time and only seven different persons in all were confirmed by the Senate because of it. In 1938 Senator

[1] See, among the many protests against Sec. 203, the letter from the Secretary of Agriculture in 75th Congress, 3rd Session, Senate Select Committee on Government Organization, *Hearings on S. 2700* (1937), pp. 362–65.

[2] 83 *Congressional Record* 3300 (1938).

[3] The act of August 14, 1935, Sec. 903, stated: "Appointments of attorneys and experts may be made without regard to the civil-service laws."

McKellar sought by an amendment of the appropriation act to impose confirmation upon "attorneys and experts" in every independent establishment when paid at the rate of $5,000 or more and not appointed under civil service. Senator Glass thought that "the Senate is as competent to make these selections as the miserable bureaucrats in Washington." Senator Norris battled successfully to exempt the TVA. Thus modified, the McKellar amendment was adopted. The House, by a vote of 158 to 10, backed its managers in their refusal to accept it in conference.[1] "I have it on fair authority that there are at least 1,000 or more select jobs involved herein," said Dirksen. "You may say that each Senator may get $50,000 worth of jobs."

In 1939 certain positions in two departments, when paid $7,500 or more, were brought within senatorial confirmation. In one of these cases, involving the Department of Justice, the requirement has been renewed and even extended in subsequent appropriation acts. This provision was first inserted in 1937 by a Senate amendment covering attorneys in the anti-trust division who were paid $5,000 or more; the invitation was the increase of funds for anti-trust enforcement. The House conferees, after "four trips," were willing to give way if the salary standard was raised to $7,500. Despite expostulations about senatorial aggrandizement from Ramspeck, Cochran, and others, the House agreed to the compromise by a vote of 80 to 44.[2] In addition, the appropriations enacted in 1942 and in 1943 required confirmation of attorneys engaged at the rate of $7,500 or more to help in "special matters and cases." Down to the middle of 1943, however, no appointments in the Department of Justice have been made which came within either provision.

The other instance in 1939 was linked to the novel and never renewed appropriation of $100,000 to the Secretary of Commerce "for personal services of experts and specialists at rates not to exceed $9,000" and appointed without regard to civil service. The request for this fund reflected a very sensible innovation by Secretary Hopkins which required freedom in the selection of a peculiarly personal staff of advisers. But the House accepted the Senate's limiting amendment without discussion.

The Selective Training and Service Act of September 16, 1940, in authorizing the director to appoint subordinate personnel, provided "that any person so appointed, assigned or detailed to a position the compensation of which is at a rate in excess of $5,000 per annum shall be appointed, assigned, or detailed by and with the advice and consent of the Senate."[3]

In the case of the Office of Government Reports, the Senate struck expressly at the post of "state director" without regard to salary. The supplementary deficiency appropriation act of July 3, 1941 stated that "no part of this appropriation shall be used for the payment of compensation of any state director hereafter appointed unless such person is appointed by the President, by and with the advice and consent of the Senate." This language was repeated in the regular act passed in 1942—the last year in which appropriations were made for the Office of Government Reports—and nominations were submitted and confirmed for twenty-three states. In one case, a name was

[1] 83 *Congressional Record* 3866 (1938). Mr. Ramspeck said that the original form of the McKellar amendment to the bill (H.R. 8837) had not excepted civil-service appointees and would have covered 23,000 positions.

[2] 84 *Congressional Record* 7815 (1939). In this instance the chairman of the House subcommittee in charge of the bill expressed the view that "any man or woman appointed to a position in this Government paying a salary of $7,500 a year or more should have the check of the Senate or somebody as to his or her qualifications."

[3] 54 Stat. 897. In 1940 the national director and twenty state directors of Selective Service were nominated and confirmed; in 1941 the chief of the Medical Division and nine state directors; in 1942 the name of a state director nominated and not confirmed in the preceding session was withdrawn, while three statisticians and other technicians were nominated and confirmed; in 1943 (to July 8) one state director was confirmed.

withdrawn after five months and another nomination submitted.

Two minor uses of a salary standard in 1942 may be noted. The appropriation carried by a deficiency act to enable the OCD to conduct civil protection required presidential appointment and senatorial confirmation of all persons paid more than $4,500.[1] This proviso the Senate put beside the House's prohibition of expenditures "on instruction or to direct instruction in physical fitness by dancers, fan dancing, street shows, theatrical performances, or other public entertainments." Actually only one nomination was specifically made under the proviso, for otherwise the key posts in the protective equipment procurement program were held by commissioned Army officers detailed to the OCD. Later in 1942, in connection with the recently created Army Specialist Corps, the Army Appropriation Act said that no money it carried "shall be available to pay the salary of any member of such corps at a rate in excess of $5,000 per annum unless such member is appointed by the President, by and with the advice and consent of the Senate."[2]

The War Manpower Commission was the butt of the major assertion in 1942 of the Senate's mounting claims. A supplemental appropriation act of October 26 stipulated "that no part of this appropriation shall be available to pay the salary of any person at the rate of $4,500 per annum or more unless such person shall have been appointed by the President, by and with the advice and consent of the Senate." [3] Senator McKellar, author of the proviso, had seemingly been touched off by a phone call he made to the Manpower Commission, in which he was first irked by what he thought the dissembling of a receptionist and then by the firm, if strictly polite, stand of the executive director. Significantly, the Commission was then in course of developing a strong field organization. After the rider became effective Chairman McNutt pleaded with a Senate appropriations subcommittee in March, 1943, saying: "I pointed out to the House, and I point out to you gentlemen, that this proviso is hindering the prompt establishment of field offices of the War Manpower Commission, where most of the new appointments are being made." [4] But the provision stuck until it lapsed at the end of the fiscal year. Experience with it covered eight months and involved about 180 nominations. Comment upon this experience may wait until, in later paragraphs, the method of the Senate and the reactions of its procedures upon the administrative process are discussed with reference to confirmation generally. Meanwhile, note should be taken of the attitudes and arguments that have motivated and supported the series of incidents since 1935 which culminated in the two wide, bold essays by the Senate in 1943.

The Senate's Reasons

THE reasons for seeking more senatorial confirmation are partly expressed, partly implicit. Senators vary in the stress they place upon emergency conditions as grounds for their demand. A composite picture of the forces at work may be drawn from a few allusions and quotations.

Senator Wheeler thought that "if there had been the old establishment this question would not have arisen. . . . I have seen for the last few years these abuses and promo-

[1] 56 Stat. 99. The appropriation was tied to the act of January 27, 1942, 56 Stat. 19, "to provide protection of persons and property from bombing attacks."

[2] 56 Stat. 613, approved July 2, 1942. The corps was created under Executive Order No. 9078, February 25, 1942. While recruiting for the corps was active—July to October, inclusive, 1942—49 members were confirmed by the Senate.

[3] 56 Stat. 998, approved October 26, 1942. The President wrote to the National Civil Service Reform League (which had asked him to veto the bill) that "while I felt obliged to approve the bill, I agree with the position you have taken with respect to this matter." On February 1, 1943, the President, in transmitting a supplementary estimate, asked for the repeal of the provision.

[4] 78th Congress, 1st Session, Senate Committee on Appropriations, *Hearings before a Subcommittee on the First Deficiency Appropriation Bill for 1943*, p. 223. Paul McNutt's protests were the more convincing because they were the result of administrative experience, not an inherited allergy.

tions in putting men and opposites, young people just out of college, lawyers, and everybody else coming in here and drawing down eight and nine thousand dollars a year. . . ." [1] District judges in his state, he said, "only get $5,000 a year, and they are delighted to get it." Senator Vandenberg spoke in similar terms of the early McKellar bill of 1943, "which I would not support in normal times but which I believe to be absolutely indispensable in these abnormal times, if Congress shall be in a position to respond to the country's demand that the taxpayer shall be protected against the pay roller." [2] On the side of economy, Senator Chandler echoed McKellar's assertion that "one of the purposes of this bill is to see how many of this vast increase from 1,000,000 to 3,000,000 employees are really necessary." [3] Senator Chandler believed the Senate could cut the number by half, and Senator Wherry found this statement "very constructive and very convincing." [4]

Further grounds for supporting more senatorial confirmation have been the extent of the positions still outside civil service and the nature of civil-service clearance under wartime pressure. Senator Wheeler complained: "These departments just call up the Civil Service and tell them they want them." [5] In the House, Taber declared that "at the present time the agencies of government have been filled up with appointments of the type that Harry Hopkins, Benny Cohen, and David K. Niles have dictated." [6] He favored senatorial confirmation at the $5,500 level and above "to clean up the civil service of the United States." Such arguments were usually based upon the absence of careful civil-service procedures, to which the speakers purported to be friendly. Senator McKellar spoke often in this vein, although he sometimes confessed to doubts about the Civil Service Commission bureaucracy—"the greatest patronage institution in the world"—and wanted "to say that in my judgment the clerks in the Civil Service Commission cannot select the officers of this Government and make a success of it." [7] Senators found provocation, too, in the fact that even the heads of many of the mightiest war agencies had not been confirmed by the Senate.[8]

Note has already been taken of the impetus toward enlarged senatorial confirmation that has attended the emphasis in recent years upon regional and other field offices. "In the operation of the manpower program," testified Paul McNutt, "I look to our regional directors for the successful direction of our activities in their respective areas. Their operation is at the local level. That is where it stands or falls." [9] The regional directors of Manpower were supposed to recommend all the subordinate and subregional personnel that came before the Senate. In the face of regional developments generally, some senators have been restive about potent areas embracing more than one state. Few, of course, have gone as far as Senator McKellar in the conclusions he has drawn from the fact that "the word 'region' does not appear in the Constitution." [10] Where more than one senator is involved, senatorial courtesy is seldom nullified by self-cancellation, as some administrators

[1] 78th Congress, 1st Session, Senate Committee on the Judiciary, *Hearing before a Subcommittee on S. 575*, p. 57.
[2] 89 *Congressional Record* 1333 (1943).
[3] *Ibid.*, p. 1213.
[4] *Ibid.*, pp. 5446, 5447.
[5] 78th Congress, 1st Session, Senate Committee on the Judiciary, *Hearing before a Subcommittee on S. 575*, p. 4.
[6] 89 *Congressional Record* 7570 (1943).
[7] 78th Congress, 1st Session, Senate Committee on the Judiciary, *Hearing before a Subcommittee on S. 575*, pp. 7, 23.
[8] See, for example, the reference to "ten of the most important policy-determining officials of the Government"—Byrnes, Davis, Hopkins, Jeffers, Landis, McNutt (as Manpower chairman), Nelson, Rockefeller, Stettinius, and Wallace (as head of Economic Warfare)—in 89 *Congressional Record* 1913 (1943).
[9] 78th Congress, 1st Session, Senate Committee on Military Affairs, *Hearings on Civilian Nominations in the War Manpower Commission* (1943), p. 1.
[10] 78th Congress, 1st Session, Senate Committee on the Judiciary, *Hearing before a Subcommittee on S. 575*, p. 14. "I think Congress will probably abolish the regions," remarked Senator McKellar, ". . . all regions except those that have been established by the Congress itself."

seemed to hope a few years ago. After a little creaking, clearance has been made multiple.[1]

The point is that the location of power in the field excites the attention of senators. From the administrative standpoint, the difficult problem—one is too hopeful to call it a dilemma—is to combine integral responsibility with an awareness and responsive understanding of variant local conditions. The advocates of senatorial confirmation have their solution. In the words of Senator O'Mahoney, the inclusion of "the heads and assistant heads of regional, area, or State offices" was justified for the following reasons: " . . . in the vast new agencies, which are exercising such broad powers in the war effort, powers which affect the intimate daily lives of all of the people of America, those who have that responsibility in regions and in areas should be regarded as policy making, and their names should come before the Senate for review. . . ." [2] In a related vein, the majority report talked of senatorial confirmation as a protection of "the sovereignty of the states," [3] and a House member from the West thought that with confirmation "a lot of these people through the States would work with the State representatives with some measure of cooperation, which they are not getting now." [4]

Fundamentally, the jealous zest of the Senate has been a phase of the rising impulse of Congress to participate in vast powers that it dared neither to withhold nor to withdraw.[5] Senator Vandenberg illustrated this attitude when explaining why he favored the principle of the McKellar bill in face of the fact that he was appalled at the physical problem of attempting to pass on thirty or thirty-five thousand nominations. Nevertheless, he said, "this is one of the few ways in which Congress can reach back into the implementing of its delegated powers, and have something to say and do by way of limitation of the sprawling bureaucracy which is the curse of our present-day democracy." [6]

Against the House's method of sniping at individuals by clauses of virtual attainder in the appropriation bills, senatorial confirmation was represented as a refined as well as constitutionally proper control. "For years," said Senator McKellar, "we have been adopting a very crude way of showing our indignation at certain officers of the Government . . . upon more mature reflection I am not sure that it is a correct method . . . it looks as if it is singling the man out." [7] He then said of his own measure: "The pending bill would take care of such a situation. We would not have such a man in the Government. None of us here are Communists."

Constitutional Perplexities

AROUND the foregoing reasoned grounds and half-spoken grievances has been thrown the mantle of constitutional argument. The questions are indeed perplexing. Who are "officers," to be appointed by the President, by and with the advice and consent of the Senate? What principle, if any, distinguishes them from "inferior officers," the appointment of which Congress may vest by law "as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments"? What are "departments" within the meaning of the phrase just quoted? In addition to "officers" and "inferior officers," are there other categories, such as "employees" and "agents," with different implications as to possible modes of appointment? The complexities that grow up around seemingly simple language cling like sticky fly-paper.

The original language might reasonably

[1] 78th Congress, 1st Session, Senate Committee on Military Affairs, *Hearings on Civilian Nominations in the War Manpower Commission*, pp. 35–36.

[2] 89 *Congressional Record* 5358 (1943).

[3] 78th Congress, 1st Session, *Senate Report 180*, Part 1, p. 4.

[4] 89 *Congressional Record* 7574 (1943).

[5] For an analysis of this mood, especially on the side of the restive House, see Arthur W. Macmahon, "Congressional Oversight of Administration: The Power of the Purse," 58 *Political Science Quarterly* 161–90, 380–414 (June and September, 1943).

[6] 89 *Congressional Record* 5361 (1943).

[7] *Ibid.*, p. 5447.

have been construed as a broad mandate of hierarchy, integral in spirit with the phrases which vest executive power in the President and direct that "he shall take care that the laws be faithfully executed." "Departments" might have been construed to include commissions and all other independent establishments of "non-Cabinet" nature. The bulk of the appointing power might have been considered to be vested in the departmental heads (whether single or collegiate), thus respecting both the constitutional language and the practical need for departmental cohesion. At the same time, a loosely institutional view could have been taken of the meaning of "appointment," so that its exercise in the name of the head would include the operation of personnel offices at various levels below and sustain the legality of civil-service recruitment, even if the appointing officer was confined (with the privilege of rejection) to one person certified for each vacancy.[1]

Within such a flexible working interpretation of the appointing power, it could have been left to the long-run good sense of Congress to indicate the positions, relatively few in number, which by reason of their involvement in the determination of policy (as distinguished from its preparation or its application) should be named by the President with the consent of the Senate.

Actually, the practice of government (while fundamentally on the track of the pattern just sketched) has confused the situation both as a matter of statutory development and of interpretations by law officers and courts. The verbiage of the statutes has been loose, talking almost indistinguishably of offices and positions, officers and employees and clerks. The law has not been careful to vest the final stage of appointment in department heads, although a sensible interpretation could usually find this to be implied. Legally, the situation has been further muddied by the fact that the chief rulings and judicial decisions (usually elicited by such oblique issues as the applicability of a penal statute) have not turned on the question whether jobs were important or might by their inherent nature be considered inferior. Rather, the distinctions have usually hinged on the intermittent or permanent character of the service rendered. Thus, the leading case of *U. S.* v. *Germaine*[2] involved a surgeon appointed by the Commissioner of Pensions. Was he an "officer" within the meaning of that word in a statute that punished extortion? The court held that he was not an officer, saying: "In the case before us, the duties are not continuing or permanent, and they are occasional and intermittent." This echoed *U. S.* v. *Hartwell*,[3] where the court said of "office": "The term embraces the ideas of tenure, duration, emolument, and duties." These views re-echoed John Marshall in a much earlier decision on circuit, wherein he suggested that "if the duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, . . . and if those duties continue, though the person is changed," the employment is an office.[4] It would be idle to note how these dicta have been bandied in other cases and opinions. Obviously, the decisions quoted (although realistic enough in the distinction that they drew) do not clarify the line between "officers" and "inferior officers." They have tended to blur the whole problem by seeming to support the unstudied assumption by Congress that there are masses of employees who are not "officers." [5] The practical advantage of this

[1] E. S. Corwin, *The President: Office and Powers* (New York University Press, 1940), p. 72, after noting the inconclusive adjudication of this whole problem, soundly remarks: "The Court will, nevertheless, be astute to ascribe to the head of a department an appointment made by an inferior to such head."

[2] 99 U. S. 508 (1878). See also, typically, *Auffmordt* v. *Hedden*, 137 U. S. 310 (1890), where the court said of a merchant appraiser appointed by the collector: "His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore he is not an 'officer,' within the meaning of the clause of the Constitution referred to."

[3] 73 U. S. 385 (1867).

[4] *U. S.* v. *Maurice*, 24 Myers' Federal Decisions 31 (1823).

[5] The minority report on S. 575 by Senator O'Mahoney and his associates remarked approvingly that "the

assumption is that it frees Congress in shaping the structural relationships of government. Its risk is the endangering of the lines of internal administrative responsibility sketched by the Constitution.

The confused legal situation gave Senator McKellar an excuse for proposing to return to the fundamental law. "Why," he asked, "do we want to throw this Constitution into the junk heap?" [1] He was especially bothered by the fact that, even as a matter of statute law, many employees do not seem to be appointed by the "heads of departments." They are appointed by "Tom, Dick, and Harry," he complained, and he said he didn't mean any particular Harry. Nor did he recognize as "departments" the great war agencies set up mainly by executive order and not having heads who were in the "Cabinet." This was a matter of acute concern to Senator McKellar. Logically, his thought seemed to require the appointment of the humblest clerk in such agencies by the President by and with the advice and consent of the Senate. But the Senator proposed to carry the return to the Constitution down only to the $3,800 level, and he was content to rest at $4,500.

The Question of Policy-determining Positions

It has been noted that the difference between the majority in the judiciary committee and Senator O'Mahoney's group turned on the rejection by the latter of so crude a demarcation line as a rate of pay. "The sound principle of government," stated the report filed by the latter group, "is that those officers whose duties are primarily political, that is to say, policy forming, should be selected in the political manner; that is, by and with the advice and consent of the Senate." [2] On the floor Senator O'Mahoney put it negatively as well as positively. "The point of it all," he declared, "is that the power of confirmation should be exercised only as to those officers who exercise policy-making functions." [3]

About this there was little dispute among the considerate members of the Senate. Senator Hatch, who fought to the end to have S. 575 referred to the Committee on Civil Service, remarked: "It is probably the unanimous opinion of the Judiciary Committee that all policy-making officials should be confirmed." The problem is the definition. It has been seen how sweeping were the classes of offices and duties in Senator O'Mahoney's substitute bill. Its functional categories gaped even when refined by such qualifying words as "final" in the phrase "responsibility for final action in connection with the preparation and promulgation of rules, regulations, or orders," and the word "determining" in the phrase "responsibility for determining the policies to be followed in administering the functions of any department, agency, or subdivision thereof." [4] Besides, the extension of confirmation to "the heads of bureaus, divisions, and sections" and "the heads and assistant heads of regional, area, or State offices" threatened to slash across the lines of accountable and coordinated departmental organization and impartial administration. In all such suggested solutions by generalized definitions

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Supreme Court . . . has held that there is a difference between officers and employees." The particular virtue that they found in this was indicated in the flattering reference to the merit system in the sentence that followed (78th Congress, 1st Session, *Senate Report 180*, Part 2, p. 2).

[1] 78th Congress, 1st Session, Senate Committee on the Judiciary, *Hearing before a Subcommittee on S. 575*, p. 4.

[2] 78th Congress, 1st Session, *Senate Report 180*, Part 2, p. 2. The report continued (introducing still another term, "administrative officers"): "Administrative officers and employees, whose functions are nonpolitical because not policy forming, should, on the other hand, be selected by the merit system and placed within the permanent civil service."

[3] 89 *Congressional Record* 5357 (1943). But Senator O'Mahoney was projecting a far-reaching and very dubious doctrine when he argued that the Senate could claim a share in choosing "policy-making" officers as an adjunct of legislative power, and not solely in consequence of the limited participation in executive action expressly provided in the Constitution.

[4] *Ibid.*, p. 5358. Senator Hatch said the bill was like taking "a steam shovel to fix a watch." The Committee on Civil Service should "obtain the most expert advice it can get, and work out, if necessary, even the names of the officers of the Government who should be confirmed, confining it purely to policy-making officials."

there is still too little regard for the popular uses of hierarchy. There is also too little recognition of the difference (without which there would be no room for a career service at all) between the preparatory and the determinative phases of policy, as well as too little respect for the distinction (in the President's words) between the determination of policy and administrative discretion.

The Senate's Burden

FROM the standpoint of the drain upon the Senate's time and its members' attention that would attend a wider use of confirmation, the estimates of the damage have varied widely. When the original McKellar bill was introduced in 1943, an editorial writer computed (on a pretty high assumed coverage) that, even if the Senate debated only one in a hundred nominations and but for five minutes, the task would take forty-five minutes a day. The President wrote on February 19: "I do not have the time personally to examine the qualifications of the individuals whose appointments would in such circumstances have to be approved by me. It is equally evident that the Congress does not have the time." He added: "Senate confirmation would either become a rubber-stamp process or a task of such magnitude as to leave little time for the conduct of legislative business and to delay appointments to essential war jobs." Much later, on the floor, Minority Leader McNary asked Senator McKellar a question: "Does the Senator have the time, able, patient, and industrious as he is, and acting chairman of the largest committee [Appropriations] having the heaviest responsibility of any in the Senate, to pass upon the appointment of 27,000 employees drawing salaries in excess of $4,500? I myself have not the time; I have not the inclination, and I think something would be wrong with my head if I did have." [1]

[1] *Ibid.*, p. 5445. Senator McKellar's reply was: "Yes, I have." It has been noted that at this stage no one had a clear idea of the numbers that would be covered by the revised version of S. 575.

Confirmation of Commissioned Officers

IN THE face of the foregoing and other grounds of criticism, the proponents of more confirmation appeal to the painless ease with which the Senate disposes of nominations in the commissioned personnel of the Army, the Navy, the Marine Corps, the Public Health Service, the Coast and Geodetic Survey, and the Foreign Service. As to some of the results, Senator McKellar was lyrical. "They have to receive the advice and consent of the Senate, and what a wonderful lot of men we have!" he exclaimed, adding: "Does any gentleman at this table recall having a scandal about communists being in the Army?" [2]

Certainly the numbers involved are vast. From March, 1933, to the end of 1942, the Senate received 34,020 Army, 20,928 Navy, and 3,964 Marine Corps nominations. During the first session of the 78th Congress, to July 8, 1943, the President sent to the Senate 31 Army messages containing 3,428 names, 33 Naval messages with 2,517 names, and 13 Marine Corps messages with 292 names. In the same period he made 322 nominations in the Public Health Service and its reserve, including renominations in about one-third of the instances because promotions had taken place within the few months involved.

It is unnecessary here to review the legislation that has curiously linked senatorial confirmation with the regular methods of advancement in these closed systems of peculiarly professional personnel. It suffices to note a few limits before passing to the Senate's procedure. In the Army only appointments and promotions at all commissioned levels in the *regular* establishment, and appointments and promotions at the rank of brigadier general and above, need be submitted to the Senate.[3] For the Navy the Senate does not act upon appointments

[2] 78th Congress, 1st Session, Senate Committee on the Judiciary, *Hearing before a Subcommittee on S. 575*, p. 6.

[3] In September, 1943, the Army as a whole had 600,000 officers. The report of the Chief of Staff as of June 30, 1943, indicated that there were 1,065 general officers—all confirmed by the Senate.

in the reserve nor upon temporary promotions in either the reserve or the regular Navy, except that all officers appointed to flag rank (that is, above the rank of captain) must be confirmed.

As to procedure, the chairman of the Committee on Military Affairs names a subcommittee of five at the beginning of each Congress, to which every Army nomination is referred. Confirmation is recommended by unanimous vote of the subcommittee. Hearings may be held, by vote of the full committee, if requested by any senator who is not a member of this group. If leverage is exerted it is not obvious in the handling of the nominations that reach the Senate, although in recent years rumor spoke of a nomination that was bruited but never made of a prominent mayor to administer military government with the rank of brigadier general. The standing orders of the Committee on Naval Affairs provide "that the chairman be authorized to report favorably nominations of naval officers when referred to the committee, after a lapse of three days, except in cases in which questions arise or in which objection is made." If objection is raised, a hearing is held before the whole committee, usually in executive session without a printed record. Perhaps there have been half a dozen such instances in the past four years. For both the Army and the Navy (including the Marine Corps and the Coast Guard) no nominations have been formally rejected since the beginning of 1940—not to extend the inquiry further back.[1] As to the Public Health Service, a high official writes that "in my experience of 33 years as a commissioned officer . . . I have never known any question being raised or any approval withheld for any officer who was recommended."

The foregoing comments show that confirmation can be made happily perfunctory. But general conclusions may not be drawn from the traditionalized handling of nominations for tightly disciplined commissioned groups protected by high professional prestige, strong sentimental appeal, and relative aloofness from controversial issues of economic policy.

Administrative Effects of Confirmation

WHAT of the nature and amount of interference with administration that attends confirmation in non-commissioned services? Potentially, at least, the forms of such interference include: the shelving, directly or indirectly, of persons whom the agencies would like to employ; delays, even when confirmation is secured; the inflexibility of appointments made under confirmation; the patronage leverages incidental to senatorial confirmation, apart from the posts immediately involved; and the subtle, spreading psychological consequences of the system.

As to the shelving of candidates, formal rejections by the Senate tell little of the story. Indeed, between the beginning of 1940 and the middle of 1943, the only listed rejections were eighteen postmasters; more will be said of these in a moment. Withdrawals of nominations from the Senate—of which there were fifty-two instances during the period just mentioned—are usually due to changed circumstances and completely innocent (one was to change a misspelled name); but they are sometimes rejections in disguise. We lack a record of the candidates who are eliminated in the preliminary canvass of senators, before the name is sent up at all. The War Manpower Commission (using as its emissary one who had been secretary of a former Indiana senator) tried out its proposed nominations on the two senators from each of the states involved. In eight months, it is said, about ten persons were knocked out in this important but entirely informal screening. In addition, there is the loss of some potential candidates who, when approached, have not wished to

[1] Indeed, one's memory must wander back much earlier for instances of open friction: to the flurry over Dr. Cary T. Grayson in 1917, not at all typical, or to the bitter, deadlocking wrangle over the attempted promotion of Commander Schley. See G. H. Haynes, *The Senate of the United States* (Houghton Mifflin Co., 1938), p. 768.

consider a post that involves confirmation.[1] Literally considered, such declinations may be few. The real impact of the reflexes of confirmation involve the unnamed, uncounted persons whom agencies do not even consider, let alone approach, because they sense possible embarrassment or because some trait or incident—perhaps a book or speech long ago—makes these individuals conspicuous and possibly vulnerable as candidates. Again, where confirmation is required above a certain salary line, as in the Department of Justice, the fact that the department names no one above the limit may indirectly forfeit it good material.

Mention has been made of a number of outright rejections of postmaster nominations. A few words about postal nominations as a whole will give perspective to these rejections. A hybrid scheme of recruitment of presidential postmasters by examination has existed since the Executive Order of March 31, 1917. The Wilson Administration undertook to name the candidate who stood highest. More leeway and outside consultation were indulged in after 1921, and in 1933 Postmaster General Farley said there was "no intention of abandoning the historic custom of inviting the advice of members of Congress with respect to the qualifications and fitness of eligible applicants in the various congressional districts." [2] The Act of June 25, 1938 [3] gave the examination system a statutory basis and the possibility of a new ideal. It stated that the postmasters of the first three classes—then approximately 15,000 in number—should thereafter "be appointed in the classified service without term by the President by and with the advice and consent of the Senate." Vacancies might be filled "by reappointment and classification, non-competitively, of the incumbent postmaster, or by promotion from within the Postal Service in accordance with the provisions of the Civil Service Act and Rules, or by competitive examination, in accordance with the provisions of the Civil Service Act and Rules."

But in deciding among the eligibles certified from a competitive postmaster examination the department still seeks advice. Here there is room for mere Representatives. "The Congressmen do the selecting," said Senator McFarland; "they select them from three high men and all we do is confirm them. . . . Yes, the Congressmen, provided they belong to the majority party." [4] In the absence of a full set of party associates below, a senator may act directly. Senator Lucas of Illinois spoke plaintively about the way the rules of the game affected him. "I should like to have Senators see the . . . files in my office," he said, ". . . containing the voluminous amount of correspondence which has accumulated with respect to practically every postmaster, and a similar amount of correspondence with respect to practically every rural-mail carrier." [5]

But on occasion the referee of postmasterships is the national committeeman of the state. This interesting "cog in the inner mechanics of the machinery" (as Senator Danaher put it) was illustrated in one of the two instances among the 28 rejections since the act of 1938 in which there was both a discussion and a vote on the floor of the Senate.[6] For the post in Fremont, Nebraska, in 1940 the department nominated the com-

[1] Chairman McNutt, testifying in January, 1943, said: "In many instances I received consent to accept the appointment, until they found out that they were subject to confirmation, when they said they simply did not feel they wanted to subject themselves to what they called the possibility of embarrassment" (78th Congress, 1st Session, Senate Committee on Military Affairs, *Hearings on Civilian Nominations in the War Manpower Commission*, p. 43).

[2] *New York Times*, April 17, 1933.

[3] 52 Stat. 1076.

[4] 78th Congress, 1st Session, Senate Committee on the Judiciary, *Hearing before a Subcommittee on S. 575*, p. 67. The quoted statement leaves room for the personal side of senatorial courtesy. On May 10, 1943, the Senate rejected a nomination reported with the bare comment: "The junior Senator from Oregon [Holman, Republican] has asked that the nomination . . . be reported unfavorably, and it has been so reported" (89 *Congressional Record* 4210 [1943]).

[5] 89 *Congressional Record* 5365 (1943).

[6] Ordinarily, postmaster nominations that are favorably reported are voted upon *en bloc;* those adversely reported are taken up separately but rejected without comment.

mitteeman's choice, despite the fact that the high man among the three eligibles was the incumbent, a veteran of the postal service since 1903, postmaster since 1920, and, incidentally, a registered Republican. Senator Burke took up cudgels in his behalf. The committeeman attributed this fit of virtue, as some would term it, to the pique of one recently repudiated in the primaries. After debate that dragged over two days and consumed three to four hours, the nominee, a Democrat, was rejected by a vote of 24 to 57.[1] It must be added, however, that he was renominated and confirmed without discussion in the next session.

On the question of the bona-fide nature of competition where examinations are held but the factors just mentioned intervene, H. Eliot Kaplan of the National Civil Service Reform League answered his own query: "Do real people attempt to compete for the postmaster appointments? They know it is hopeless unless they have the recommendations of the political organization in power in that jurisdiction." [2] This, he charged, was particularly the case in cities, with "one man competing against three or four stooges, or ghosts. . . ."

The delays that may attend anything but the most perfunctory handling of nominations *en bloc* have been both damned and denied. The risks are grave enough, especially in wartime, but the superficial record seems less serious when viewed against the background of the vexations that the administrator finds in all recruiting. The preliminaries of nomination to the Senate, at the best, are likely to increase the complications. Within the Senate, the screening subcommittee defers to the individual senators, broadening this nowadays to the states of a region. Senator Lucas of Illinois, protesting against S. 575, spoke frankly of his attitude toward nominations in the War Manpower Commission: "Some of them I have let lie on my desk as long as 3 weeks, because why should I be interested in an individual in Indiana who receives an appointment under the War Manpower Commission?" [3] His negligence, he said, was "a negligence that can be defended."

When the requirement for Manpower confirmations lapsed at the end of June, 1943, the Civil Service Commission undertook to install really competitive examinations in key field positions. In retrospect, delays under confirmation seemed less annoying. Truly (though some names were stranded in the Senate two or three months), delay in itself had not been the worst concomitant of the regimen.

Some rigidity accompanies senatorial confirmation. A man is confirmed for service at a place; he is confirmed for service at a grade and, although an advance in salary within the grade is possible at once, a further increase requires a fresh nomination.

The contacts involved in senatorial confirmation are natural opportunities for leverage. Perhaps the senator views the candidate so kindly that, on the preliminary approach, he favors a stepping up of the salary. Or, more typically, he takes occasion, when warmly endorsing the agency's choice, to bring to its attention some likely persons for subordinate positions. Those who had experience with the Manpower nominations were impressed by the relative interest of some senators in minor to middling positions, not key posts of taxing responsibility. The latter were treated as trading fulcrums.

In wartime the requirement of confirmation may impede the use of confidential personnel, including agents who serve abroad. This fear was a telling argument against the

[1] 86 *Congressional Record* 12939 (1940). In the other instance of rejection that came to a vote, involving the postmastership of Monroe, La., the incumbent not only stood highest but also had a war record; the department's "choice" among the eligibles stood at the bottom. Here the appeal to "the validity and integrity of our Civil Service system" was fortified by reminders of "the pledge made to our veterans of the late World War" (to couple one senator's phrases). The nomination was rejected by 15 to 56 (88 *Congressional Record* 7138 [1942]).

[2] 78th Congress, 1st Session, Senate Committee on the Judiciary, *Hearing before a Subcommittee on S. 575*, p. 66.

[3] 89 *Congressional Record* 5364 (1943).

confirmation rider to the War Agencies Appropriation Bill in 1943, nor did the exemption of the Office of Strategic Services suffice to dull its edge.

More important than any of the foregoing specific types of disadvantage are the almost impalpable influences wrought by the introduction of confirmation upon the morale of the personnel as a whole and their calculus of success. The mere existence of confirmation implies—even though by the barest hint, even though there be no tangible proof or realistic ground—a whole range of new and largely extraneous considerations.

A future goal of the public service may properly be to close the gap and draw the line more clearly between a perfected civil service and a few crucial positions of policy determination. The dichotomy must not be so complete that it will disregard the need for aides under both the chief executive and the departmental heads who can be appointed and serve in staff relationships of flexible intimacy. The Civil Service Commission, in seeking now to recruit competitively for posts as near the people as the field positions of the Manpower Commission, may be truly creative when it gives weight to prior civic activity, even in party circles. A democracy cannot afford to exclude from its administration the impulses thus shown. Generally, it has been apparent how much need for implementation and definition was left by the Executive Order of 1938 and the Ramspeck Act of 1940. But war years are hardly the time for hasty statutory dogmatizing.

The Purge of Federal Employees Accused of Disloyalty

By ROBERT E. CUSHMAN

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THE United States government employs more than three million men and women. They are engaged in an enormous variety of tasks, many of which form part of our war effort. All would agree that the government should not employ persons who are disloyal or who seek to overthrow our system of government. In time of war these questions of loyalty take on increased practical importance and attract wide attention. For several years widely varying efforts have been going on in Washington to scrutinize the loyalty of federal employees, to bring about the dismissal of those found to be disloyal or "subversive," and to prevent such persons from being appointed. The armed services handle these problems of disloyalty for their own personnel, civil as well as military, through the Army and Navy Intelligence Services, and these need not concern us here. The Federal Bureau of Investigation need not be discussed separately since it is exclusively an investigating, not an acting, agency. It has no authority to dismiss or exonerate any accused federal employee (outside its own staff), nor does it even recommend such action. It is purely a service agency.

The active campaign to deal with the problem of the loyalty of federal employees has moved through three channels. The first is Congress itself. Acting upon findings and recommendations of the Dies Committee and the Kerr Committee, Congress recently attached a rider to a major appropriation bill cutting off the salaries of three men, mentioned by name, who had been accused of subversive tendencies. Second, two successive "interdepartmental committees" have been appointed, one by the Attorney General and the other by the President, to advise the departments and coordinate their efforts in handling accusations of disloyalty brought against long lists of federal employees. Third, the Civil Service Commission conducts investigations into the loyalty of large numbers of applicants for government employment. Usually these investigations are made after the employee has actually been put on the payroll but before he has been finally "certified" by the Commission. The purpose of this article is to describe how these three parallel efforts to handle the problem of the loyalty of federal employees have been carried on, to discuss the questions of constitutionality, policy, and procedure involved, and to venture certain conclusions and proposals.

The Congressional Purge

THE congressional "purge" in July, 1943, of three federal employees by withholding money for their salaries stemmed from the activities of Congressman Dies, chairman of the House Committee to Investigate Un-American Activities. The work of this committee can be dealt with here only as it enters here and there into the broader picture. Mr. Dies had accumulated long lists of federal employees whom he accused of being "Communists," or otherwise "subversive," but neither Congress nor the heads of executive departments had taken substantial action on his charges. On February 1, 1943, Mr. Dies, in a long speech in the House in reply to outside criticism, named thirty-nine

federal employees who, he said, were Communists or "fellow-travellers," as well as "irresponsible, crackpot, radical bureaucrats."[1]

Immediately an amendment was introduced to the Treasury and Post Office Appropriation Bill then before the House providing that no funds appropriated in the bill should be used to pay the salaries of any of the named thirty-nine employees. When it was pointed out that only one of the thirty-nine, William Pickens,[2] was on the Treasury or Post Office payroll, the House defeated the amendment 146 to 153, but passed on a snap vote a second amendment withholding salary from Pickens. This vote was 163 to 111. The political apprehensions, if not the conscience, of the House were aroused three days later when it was discovered that Pickens was a Negro, and the only Negro among the thirty-nine. The backfire from what looked on its face like racial discrimination was sure to be substantial. The worried members began to look more closely at the way in which they had gotten into this jam, and some resentment was manifest at the cavalier way in which Mr. Dies had persuaded them to act summarily upon his accusations. There was much talk about giving the thirty-nine men their "day in court." Finally, on motion of Mr. Cannon, chairman of the House Appropriations Committee, a compromise was worked out. This compromise created a sub-committee of the Committee on Appropriations to investigate and report upon the fitness of the accused men to hold federal office. The committee was created without a roll-call vote. The rider "purging" Pickens was then voted down 136 to 267. As someone cynically remarked to a southern member, "You kicked him off because he was Red. You put him back because he was black."

The chairman of the new sub-committee was Mr. Kerr of North Carolina. There were two other Democrats, Gore of Tennessee and Anderson of New Mexico, and two Republicans, Keefe of Wisconsin and Powers of New Jersey, on the committee. The creation of the Kerr Committee was widely regarded as a rebuke to Mr. Dies. The theory at this point appears to have been that the committee would serve as a sort of grand jury to which the charges against federal employees would be submitted by Mr. Dies; the charges would be sifted and the committee would report back to the House which, acting as a trial jury, would make a decision. As time went on this theory was forgotten or modified, and the report of the Kerr Committee was viewed by the House as in itself the verdict of a trial jury which could properly be ratified by legislative action without further examination of the record.

The Kerr Committee was slow in getting under way because the Dies Committee was slow in presenting its evidence. By April 7 records had been provided on only ten of the thirty-nine names on the Dies list, and only three of these were fully ready for consideration. On March 23 the committee met and adopted ten rules of procedure, which were made public on June 1 in reply to criticism of the committee's methods. The salient points in these rules of procedure were the following: The accused employees were to be summoned for examination by "invitation" rather than subpoena. All sessions of the committee were to be executive. The accused could appear before the committee and make statements or explanations under oath, and answer questions. The accused should be advised of "the specific charges and allegations made" or should be told that he could have them on request. The record of the case should include evidence secured from the records of the FBI, the Dies Committee, and any other investigating agencies (records which are, of course, highly confidential). If the committee found it necessary to resort to subpoena

[1] For an accurate and documented record of the legislative history of the congressional purge, see F. L. Schuman, "Bill of Attainder in the Seventy-eighth Congress," 37 *American Political Science Review* (October, 1943).

[2] Pickens is a distinguished Negro, former field secretary of the National Association for the Advancement of Colored People, and was directing for the Treasury the Negro war bond campaigns.

to secure evidence or to compel the accused to testify, then it might adopt other rules of procedure. Rule 7 was of special interest, since it stated the committee's definition of the "subversive activity" which it had been set up to explore. The definition is as follows:

> Subversive activity in this country derives from conduct intentionally destructive of or inimical to the government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by an effort to overthrow, or subtle and indirect as by sabotage.

The Kerr Committee began its examination of the accused men on April 2. On April 21 it made its first report, in which in a document of four and a half pages it stated that Goodwin B. Watson and William E. Dodd, Jr., had been examined and found guilty of "subversive activity" within the committee's definition and were "unfit" to continue in government employment. The committee reported that it had not found "sufficient evidence to support a recommendation of unfitness . . . at this time" in the case of Frederick L. Schuman. All three men were employees of the Federal Communications Commission. On May 14 the committee reported that Robert Morss Lovett, Secretary of the Virgin Islands, was "unfit" for government service, but exonerated with high praise Arthur E. Goldschmidt and Jack B. Fahy, both in the Department of the Interior. On July 6 Mr. Kerr wrote to Chairman Cannon of the House Appropriations Committee that the Kerr Committee would suspend activities until November 15 and that the committee had not found sufficient evidence of unfitness in the cases of Marcus I. Goldman, Nathaniel Weyl, and David Wahl. Thus nine employees were examined and six were cleared of the charges brought against them.

Any idea that the agencies employing Lovett, Watson, and Dodd would dismiss them because of the adverse report of the Kerr Committee was promptly killed by vigorous official statements in defense of the three men. The Federal Communications Commission, after careful consideration of the problem, issued a sharp attack on the authority, procedure, and conclusions of the Kerr Committee, strongly defended Watson and Dodd, and refused to dismiss them. Later the Commission accorded Dodd a special hearing on charges made against him by a member of the Kerr Committee on the floor of the House and exonerated him by unanimous vote. Secretary Ickes protested against the report on Lovett and later read before the Senate Committee on Appropriations a devastating attack on the committee and its methods and an enthusiastic eulogy of Lovett.

The refusal of the employing agencies to follow the Kerr Committee recommendations strengthened the determination of many members of the House to dismiss the three men by legislative action. Mr. Dies had repeatedly complained that the executive departments persisted in whitewashing their subversive and communistic employees, and here was what looked like evidence of the fact. On May 14 the Committee on Appropriations offered an amendment to the Urgent Deficiency Appropriations Bill (H.R. 2714, Sec. 304) providing that no money appropriated in the Act should be used to pay the salaries of Lovett, Watson, and Dodd. The House passed the amendment on May 18 by a vote of 317 to 62. Two days later, after Mr. Ickes' powerful statement had been presented to its Committee on Appropriations, the Senate rejected the rider unanimously. A stubborn fight between the two houses ensued. Efforts by House and Senate conferees to reach agreement failed. The Senate bitterly assailed the procedure of the Kerr Committee, charged that it was being asked to dismiss men without knowing the evidence against them, and challenged the constitutionality of the Kerr Committee rider. Six times the Senate rejected the rider by overwhelming majorities, but the House refused to budge. Finally, with the end of

the fiscal year approaching with no appropriation bill passed, the Senate reluctantly concurred in a compromise amendment providing that no money should be paid for the salaries of Lovett, Watson, and Dodd after November 15, 1943, unless in the meantime their names had been submitted by the President to the Senate and their appointments duly confirmed by that body. The action in the case of Dr. Lovett was even more drastic, for in the Department of Interior Appropriation Bill the office which he held, Secretary of the Virgin Islands, was abolished. Since Congress clearly has complete discretion to abolish such an office, this action took Dr. Lovett off the payroll regardless of the Kerr Committee rider and also deprived him of any possible standing to contest the validity of the rider in court. Secretary Ickes has since appointed him Executive Secretary to the Governor of the Virgin Islands so that his legal position is now the same as that of Watson and Dodd.

On July 14 President Roosevelt told his press conference that he would have vetoed the Kerr Committee rider had he been able to do so without sacrificing the entire appropriation bill. He declared it to be an objectionable and unconstitutional usurpation by Congress of executive and judicial functions and announced that he did not regard it as binding upon the Executive. When Congress convened in September after a summer recess, he sent a written message embodying this protest. The three men have retained counsel and plans are going forward to contest their dismissal in the courts.

How shall we appraise what Congress has done, and shows signs of continuing to do, in thus "purging" the federal payrolls of those alleged to be guilty of "subversive activity"? Two broad problems clearly call for analysis. First, is the action taken by Congress in these cases constitutional? Second, assuming that it is constitutional, can it be defended on grounds of expediency and justice?

Constitutionality of the Kerr Committee Rider. The constitutionality of the action of Congress under review was widely discussed in and out of Congress. Naturally, different arguments were advanced by different persons, and varying degrees of importance were attached to the issues here presented. Different views were taken of the nature and purpose of the congressional action under review, and different constitutional inferences resulted. For example, if one assumes that Congress in withholding these salaries is not punishing the three men involved but is merely exercising the employer's freedom to discharge employees no longer acceptable to him, his judgment on the validity of the proceeding will be colored by that view. It becomes relevant, therefore, to analyze the legal nature of the action taken in order to form an opinion on how the Supreme Court is likely to classify it. The label which Congress or its members may place on the proceeding is not *ipso facto* controlling.

In the first place, a constitutional issue of controlling importance is whether Congress enjoys a constitutionally unlimited discretion to appropriate or to refuse to appropriate money from the federal Treasury. The case for the congressional action rests largely on the assumption of this unlimited "power of the purse." Congress alone may spend money or authorize its expenditure. Congress creates the offices of government and appropriates the money for the salaries of federal officers and employees and for the carrying on of their work. Congress may and often has specified in appropriation bills that money shall not be used for specific purposes—the carrying on of official activities to which Congress objects. Congress can abolish offices, providing it does not violate the constitutional guarantee of tenure during good behavior for federal judges. If it can do all these things, why cannot it also provide by law that no money shall be spent to pay the salary of a federal employee who has incurred congressional displeasure? In short, if Congress could get rid of Dr. Lovett by abolishing his job, as any constitutional lawyer would have to admit, why cannot it accomplish the same thing more directly by

refusing to pay him his salary? It is obvious that if there are no constitutional limitations on the power to spend or not to spend money, then there is an end to all constitutional argument regarding the congressional rider.

This extreme position, however, is clearly unsound. It is true that money cannot validly be paid out of the Treasury save in accordance with an appropriation made by law. It is also true that there is no way in which the Supreme Court can compel Congress to appropriate money if it declines to do so. But it is a firmly established principle of constitutional law that the powers delegated to Congress by the Constitution are restricted by the prohibitions, expressed and implied, found elsewhere in the Constitution. No one would defend the validity of a rider to an appropriation bill which provided that salaries should not be paid to Roman Catholics or atheists. This would clearly violate the First Amendment, and it would still violate the First Amendment even though there is no judicial process by which money to pay the salaries can be gotten out of the Treasury. We may, therefore, abandon what Representative Hobbs referred to as "the mistaken conception that the power of the purse is omnipotent and can override the Constitution," and turn to the specific constitutional objections urged against the Kerr Committee rider.

The clearest constitutional objection to the action taken by Congress is that it violates the doctrine of the separation of powers by usurping the executive function of removal of officers. The Supreme Court in *Myers* v. *United States* (272 U.S. 52, 1926) made it abundantly clear that the power to remove officers, save by impeachment, belongs to the President or, in the case of inferior officers, to such other executive officials as Congress may designate. The statute invalidated in the Myers case made the Senate a partner in the exercise of the removal power by requiring senatorial confirmation of removals. If one of the houses of Congress cannot validly *share* the removal power, it seems, *a fortiori*, that Congress itself cannot validly *exercise* the power. It is no answer to this point to say that Congress has not removed Lovett, Watson, and Dodd from office, but has merely deprived them of their salaries. This is a distinction without a difference; and the writer believes the Supreme Court will hold that Congress has unconstitutionally usurped an executive function.

A further constitutional question is whether the congressional rider violates the clauses of the Constitution relating to impeachment. The Constitution gives Congress a carefully described and limited power to remove federal officers by impeachment. Officers may be impeached for "treason, bribery, or other high crimes and misdemeanors," and the procedure required is so elaborate and rigid as to be virtually unworkable. It is a reasonable inference that the framers of the Constitution by establishing this carefully safeguarded method by which Congress might remove federal officers intended it to be the only method open to Congress. It is impossible to believe that they intended to sanction the use by Congress of a highly informal method of removing federal officials which is wholly devoid of any safeguards for the protection of the officer, let alone the rigid ones required in the impeachment clauses. It is no adequate answer to this argument to say that the three men whom Congress has removed are not "civil officers" but employees. The distinction between the two groups is often purely fortuitous. But if Lovett, Watson, and Dodd are not "civil officers" and therefore cannot be impeached, it seems clear that the intention of the framers was to leave the dismissal of federal "employees" to their executive superiors. Congress could still impeach the department head who retained on his staff an "employee" guilty of "treason, bribery, or other high crimes and misdemeanors." Nor is Mr. Kerr's reasoning persuasive that the congressional action need not meet the requirements of an impeachment since the men were not accused of

"treason, bribery, or other high crimes and misdemeanors." It is evasion to urge that Lovett, Watson, and Dodd were not charged with crimes. They were accused of "subversive activity" and were removed because the Kerr Committee found them guilty of it. They were invalidly subjected to a crude substitute for impeachment minus any of the safeguards of impeachment. This is probably what President Roosevelt had in mind in charging that Congress, through the Kerr Committee rider, had usurped judicial power. It assumed the authority to pass on the guilt or innocence of the three men and mete out the penalty of forfeiture of pay.

This raises the important constitutional question whether the action of Congress in this case constituted a bill of attainder, which is forbidden by the Constitution. As defined by the Supreme Court, a "bill of attainder is a legislative act which inflicts punishment without a judicial trial." Had Congress imposed on Lovett, Watson, and Dodd fines of several thousand dollars because of their "subversive activity," such action would clearly have been a bill of attainder. The present action does essentially the same thing for the same purpose. The Supreme Court has dealt with bills of attainder in but two cases, both involving the "Test Oath" legislation enacted after the Civil War. In one of these, *Ex parte* Garland (4 Wallace 333, 1867) the Court held that a federal statute barring from practice in the federal courts lawyers who could not swear that they had not fought for or aided the Confederacy was a bill of attainder and also an *ex post facto* law. In *Cummings* v. *Missouri* (4 Wallace 277, 1867) a provision of the state constitution barred those who could not take a similar oath from holding any public office, practicing law, or serving as a teacher or clergyman. The provision was enforced against Cummings, who was a Catholic priest. The Supreme Court found these provisions void as bills of attainder and *ex post facto* laws. In the Cummings case Mr. Justice Field observed:

> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

The deprivation of salary in the congressional rider appears to be punishment of the men so treated in the sense in which exclusion from public office or profession was held to be punishment in the Garland and Cummings cases. It is interesting, also, that what Congress and the State of Missouri were trying to do in the two measures which the Court held void was essentially the same thing which Congress was trying to do in its recent rider; namely, keep men out of the public service because of past disloyalty or because of subversive activity or associations. Both the Cummings and the Garland cases were decided by five-to-four votes, and the decisions have been sharply criticized by some constitutional lawyers. They remain law, however, and the principles which they establish seem clearly applicable to the present action of Congress. The assertions of members of Congress that they did not intend to "punish" the three men involved, but merely to get rid of "unfit" persons, is irrelevant if the action taken falls within the legal definition of punishment, as it seems clearly to do.

Two other constitutional objections have been urged against the congressional rider. While each states a tenable criticism of the action taken, the writer believes that neither would prove effective in the Supreme Court. The first is the contention that Lovett, Watson, and Dodd have been denied due process of law. This is an attack upon the validity of the procedure followed by the Kerr Committee and by Congress. It seems more probable that the Court will hold that Congress has done something which is beyond its power than that it has exercised a valid power by a procedure which violates the

Fifth Amendment. The second contention is that the action of Congress violates the First Amendment by abridging freedom of speech and freedom of press. The three men were deprived of their positions because of oral or published political opinions which were admittedly in violation of no criminal statutes. Whatever may be the effect of the rider upon the general status of freedom of opinion and the expression of it among members of the federal services, it seems to this writer that the connection between the two is rather too roundabout to form the basis of a persuasive constitutional argument. It seems more relevant to the policy followed by the Congress than to the validity of the rider.

Before leaving the constitutional analysis it should be stated that our system of government does not assure a judicial remedy for every violation of the Constitution. Congress may and sometimes does abuse its powers in ways beyond the reach of the courts. The Supreme Court has shown reluctance to assume jurisdiction in cases in which the spending power of Congress has been attacked. It may show the same or greater reluctance to take jurisdiction in a case in which the refusal of Congress to spend money is being attacked. It is unnecessary to discuss here the legal remedies open to Lovett, Watson, and Dodd in attacking the validity of the congressional rider. If the Supreme Court finds itself able to take jurisdiction in the case, it is the opinion of the writer that it should hold the action of Congress unconstitutional.

Expediency and Justice of the Purge. If the Supreme Court upholds the validity of the congressional action striking Lovett, Watson, and Dodd off the federal payroll or finds that it has no jurisdiction to pass on the question, the question will still remain whether the action taken by Congress was wise and just. Those who have applied to the rider these broader tests of sound policy and fair play have brought three main indictments against it which we may now appraise.

In the first place, it is urged that the congressional "purging" of federal employees who may be suspected of "subversive" tendencies or ideologies is a serious menace to sound administration in the executive branch of the government. This is not to say that disloyal and subversive employees ought not to be removed from office; it is merely to say that Congress is not the agency to do the job. It is entirely possible for Congress to set up definite legislative standards of what is or is not "subversive activity" on the part of federal employees and provide by law for suitable executive or judicial machinery for the enforcement of those standards. This Congress has not done. The attempt of Congress to do the job directly results in a confusion of responsibility, in friction, and in inefficiency. In the present cases we see Congress dismissing from office men who are declared by their administrative superiors to be both loyal and efficient public servants. The principle of the merit system by which the federal employee holds his job because he is competent is weakened by using as a measure of his fitness his political and economic opinions and associations past and present. When Chairman Kerr was asked if his committee had inquired into the competence of Lovett, Watson, and Dodd to hold their present positions, he replied that the committee had not done so, and that it had not had time to give consideration to that matter. "Nobody asked us," said he, "to see whether these men were conducting themselves properly." It can hardly fail to affect adversely the morale of the federal service if the men employed by the government know that they are liable at any time to dismissal from office because their political opinions are obnoxious to a majority of Congress or to one of its committees. Assuming always that employees proved to be disloyal or subversive can be dismissed by orderly legal process, nothing but confusion and loss of efficiency can result from a policy of discharging employees for reasons which are irrelevant to their competence to do their assigned work.

The second and most serious charge against the legislative "purge" is that it almost inevitably results in "witch-hunting," the establishment and enforcement of political tests for office-holding, and the indirect suppression or punishment of freedom of opinion and the expression of it. The "purge" stems from intolerance and itself breeds intolerance. The documentary record of the proceeding against Lovett, Watson, and Dodd bears out the truth of these charges. This record cannot be set out in detail, but attention may be drawn to a number of undisputed facts which reveal the dangerous injustice and assault upon civil liberty inherent in the entire enterprise.

In the first place, none of the men examined by the Kerr Committee were at any time accused of any criminal activity or associations. The federal statutes forbid the employment by the government of any person who is a member of an organization which advocates, or who personally advocates, the overthrow of the constitutional form of government in the United States. It was neither charged nor shown that Lovett, Watson, or Dodd was within the reach of this statute.

In the second place, if these men admittedly neither advocated the overthrow of government nor were members of organizations which did, then the committee faced the almost impossibly difficult task of defining and applying some less rigid standard or measure of what it regarded as "subversive activity." The committee freely admitted the difficulty of framing such a definition. Neither in the acts of Congress nor in the decisions of the courts was such a definition to be found. The committee, therefore, made its own definition, which has been quoted above. This was an honest effort to draft a usable standard, but not a very successful effort. It is full of words and phrases having no precise or established meaning, with the result that it readily lent itself to interpretation in terms of the loyalties, prejudices, and political ideologies of those who were interpreting and applying it. In fact, this definition, vague as it is, was seldom referred to in the examination of the accused men and appears to have served more as window-dressing in the committee's report than as an effective guide for the committee's deliberations.

The result of this lack of any satisfactory definition of "subversive activity" was that all sorts of standards were applied. This is very clear from a reading of the 380 pages of the committee hearings, tardily and reluctantly published.[1] Attention was paid to the writings and speeches of the three men in which social and economic changes were discussed, the capitalistic system was analyzed and criticized, and the achievements of the Soviet Union were favorably commented upon. Back in the era of the Teapot Dome exposures Dr. Lovett had referred in print to the federal government as "rotten," and the committee (as well as members of Congress later on) regarded this as evidence, if not of disloyalty, at least of "unfitness" for government employment. No objective observer can escape the conclusion that the political and economic views held and expressed by Lovett, Watson, and Dodd were abhorrent to the members of the committee and to a majority of the members of the House, and that this was probably the worst that could be said of them.

More attention, however, was paid by the committee to the associations of the three men and to the organizations to which they belonged. These were numerous and varied. Mr. Dies had satisfied himself that nearly all of the organizations were subversive. They were either "communistic" or "front" organizations. The Dies list was so all-inclusive and contained so many startling items, as for instance the Consumers' Union and the American Civil Liberties Union, that it did not command full confidence in Congress. As Senator McKellar shrewdly ob-

[1] Hearings before the Special Subcommittee of the Committee on Appropriations, House of Representatives, Seventy-eighth Congress, 1st Session, acting under House Resolution No. 105.

served: "It depends on who has the say-so whether an organization is communistic." Throughout its hearings the committee assumed that many of the organizations to which the three men belonged had been ruled by the Attorney General to be "subversive." This assumption is stated repeatedly in the hearings. This, however, turned out to be incorrect. In a letter to Secretary Ickes the Attorney General stated that none of the organizations in question had been found by the Department of Justice to be "subversive." All that his department had ever said with respect to any of them was that they sufficiently approached the character of "front" organizations to justify careful scrutiny of the other affiliations and views of persons who belonged to them.

The test which the Kerr Committee actually applied in adjudging "subversive" the organizations of which Lovett, Watson, and Dodd were members was stated in the first report of the committee in these words: "But the 'court of public opinion' has passed judgment upon them [twelve organizations, including the Consumers' Union] and has found them subversive and un-American." In what form this judgment of the "court of public opinion" had been expressed was not stated. It seems a fair conclusion that the Kerr Committee in the last analysis accepted and acted upon the judgment passed upon these organizations not by American public opinion but by Mr. Dies.

The record makes it amply clear that Lovett, Watson, and Dodd were dismissed not because they were dangerous or subversive within any reasonable meaning of those words but because they held and expressed political and economic views and belonged to organizations which members of the Kerr Committee and of the House did not like. Several members of the House, in supporting the rider, were frank enough to say just that. It hardly needs to be argued that to penalize men because their political ideas and associations offend a majority of the members of Congress is to give full rein to intolerance and "witch-hunting." It is bound to operate as a curb upon the federal employee's right of freedom of speech and freedom of press clearly in violation of the spirit, if not the letter, of the First Amendment. In a seldom-remembered section of the Constitution it is provided that "no religious test shall ever be required as a qualification to any office or public trust under the United States." This was directed against a form of abuse of freedom of opinion still prevalent when the Constitution was adopted. It seems certain that the failure of the Constitution to forbid the requirement of political tests as a qualification for federal office-holding was due to the conviction that such a prohibition was unnecessary rather than to any implied approval of such political tests. Had the framers believed the setting up of such political tests a possible danger, certainly they would have forbidden them. The action of Congress in the case of Lovett, Watson, and Dodd does in effect establish political tests for office-holding in violation of the principles upon which democratic government must rest.

A third indictment charging the essential injustice of the "purge" of Lovett, Watson, and Dodd is based on the procedure which was followed. While Mr. Dies thought that the procedure was unimportant as long as the final result was dismissal, the Kerr Committee did not dismiss the matter so lightly. After the contretemps in the Pickens case already referred to there was much talk in the House about giving the accused employees their "day in court," and the Kerr Committee was set up for that purpose. The confusion of thought as to the kind of task the committee was undertaking is apparent in the procedure which was followed. The committee denied throughout that it was conducting a criminal investigation or anything approaching it. It was merely determining the "fitness" of the men to hold federal offices. Any of the three men could have been removed from office by his executive

superiors for "unfitness" or for "the good of the service" without any hearing at all. The Kerr Committee and the House maintained that the procedure followed was suitable to the task assigned and generously solicitous of the rights, if any, of the accused employees.

It is clear, however, that Lovett, Watson, and Dodd were not being dismissed for any ordinary garden variety of incompetence or unfitness. Their competence was beyond question and was not questioned. They were charged with being guilty of "subversive activity"—a charge publicly branding them with what would be commonly regarded as disloyal and unpatriotic conduct. Their dismissal constituted a severe financial and professional loss and cast a serious stigma upon their reputations. They were clearly entitled to the procedural protections which essential justice accords to persons publicly accused of serious misconduct. How far short of this standard the committee's procedure fell may be readily judged from the following facts about it.

First, the three men were not given adequately specific charges setting out the accusations against them, nor were they given any time to prepare a defense against the vague charges which were made. The committee rules stipulated that the accused be informed when invited to appear of "the specific charges and allegations made." But Watson and Dodd did not receive any copy of the charges until they appeared at the hearing, while Lovett was summoned in the afternoon to a hearing the next morning. Furthermore, the interrogations were based not on the general charges finally given the accused but upon records and information received from the FBI, the Dies Committee, and other sources. As Mr. Kerr said in the House, these dossiers were in some cases three feet thick. This material the accused were not allowed to examine, nor would the committee reveal the sources of this information or the charges based upon it.

Second, the hearings were conducted in secret. A stenographic transcript of the hearings was made, but it was never submitted to the accused for comment or possible correction. In fact, the committee intended never to print the report of the hearings, claiming that it would only damage the reputations of the accused. It was finally compelled to do so by the Senate's charge that that body was being asked to vote on something it knew nothing about. The hearings were not printed until late in June, long after the first votes on the congressional rider were taken in the House and Senate.

Third, the accused were not allowed to be represented by counsel. The general counsel of the Federal Communications Commission was ordered by the Commission to attend the hearings of Watson and Dodd but was refused permission to do so by the committee. An official from the Department of the Interior was refused permission to be present as an observer at the Lovett hearings. It seems clear from a reading of the hearings that the mere presence of a friendly lawyer would have been a substantial protection to the accused men. Chairman Kerr defended this refusal of counsel on two grounds: first, that the accused did not formally demand it and, second, that they had appeared voluntarily and not under legal compulsion. The obvious answer is that the right of counsel should have been offered without any demand by the accused, and that the "voluntary" nature of the proceeding was a fiction in the first place and irrelevant in the second place.

Fourth, the accused were not confronted with the witnesses against them or even allowed, as we have seen, to know who they were. They were thus entirely unable, even had they been given an opportunity, to impeach the credibility of the evidence used against them. The committee's explanation of this is that the files of the FBI and the Dies Committee are of necessity confidential. Such investigating agencies could not get evidence if they disclosed the sources of it. This plea of administrative expediency

hardly meets the objection that confrontation of witnesses is a civil liberty deemed important enough to be included in the guarantees of the federal Bill of Rights. Furthermore, the unreliability of Mr. Dies' evidence has been a matter of public record for so long that the denial of the right to examine and impeach it is prima facie injustice of the most serious kind.

Fifth, the accused were given no adequate opportunity to defend themselves or to introduce witnesses in their behalf. They were allowed to make oral statements to the committee and were allowed to prepare written statements which appeared in the proceedings. These statements were of necessity general in nature because directed against vague and general accusations, and these statements were not included in the meager reports which the committee made to Congress and upon the basis of which action of dismissal was grounded. In the case of Watson, the committee reported without waiting to receive evidence which it had itself asked Watson to supply. The committee never even considered hearing witnesses for the defense. As one of the members of the committee remarked, "What could have been accomplished by bringing in every Tom, Dick, and Harry and letting him testify?" The agencies which employed the three men were not permitted to appear in their behalf.

Sixth, evidence in the hands of the committee and favorable to the accused was suppressed. Only the adverse evidence got into the record. The strong report of the Federal Communications Commission in defense of Watson, Schuman, and Dodd was ignored. Earlier FBI reports favorable to Watson were not mentioned. Numerous letters and statements and petitions in behalf of all three men, and especially in behalf of Lovett, were omitted.

The committee's reply to these attacks upon its procedure, apart from the suggestion that sound procedure was not really required, was that Watson and Dodd declared in response to questions asked at the end of their examinations that they were satisfied with the way in which the committee had dealt with them. These statements by the two men were repeatedly quoted in the debates in the House. There are two answers to this. The first is that these statements read in their contexts are merely acknowledgments that the accused had not been subjected to any personal discourtesy by the committee. They were made by men very naturally reluctant to offend the committee. And they were made at a time when neither of the men could possibly know how the committee was planning to use the results of the examination or what further procedures or steps it contemplated. The second answer is that the personal opinions of Watson and Dodd as to the committee's procedure are irrelevant to the issue of whether the procedure was sound. Serious denials of procedural fair play as described above cannot be condoned or justified on the basis of the polite acquiescence of the victims of the injustice. The men were not fairly treated even though at the time they said they were. Unfairness of procedure is an objective, not a subjective, quality.

The writer's conclusions with regard to the congressional "purge" of federal employees accused of subversive activity are the following: First, the action is unconstitutional as a legislative usurpation of the executive power of removal, as an ignoring of the procedural requirements of impeachment, and as a bill of attainder. There are other possible constitutional objections. Second, the action is both unwise and unjust. It is unwise as a serious assault upon good administration. It is unjust as an indirect invasion of freedom of speech and freedom of press, as the establishment of political tests as qualifications for holding federal office, and as a stimulus to "witch-hunting" and intolerance. Third, the procedure followed in effecting the "purge" was quite possibly unconstitutional as a denial of due process of law, but was certainly a denial at practically every stage of long-established standards of procedural

fair play. In short, this is a job which Congress has no constitutional power to do, and which Congress has shown itself fundamentally incapable of doing without resorting to dangerous denials of justice and civil liberty.

Executive Investigations of Federal Employees

It is well established that the discipline and dismissal of executive officers and employees, apart from impeachment, is an executive function. Congress has never disputed this. Its own exercise of the power of dismissal in the case of the three men just discussed resulted from the resentment of Mr. Dies and others at the failure of the executive branch to purge its own payroll of persons alleged to be subversive. Congress would unquestionably have preferred to have these men dismissed by their executive superiors. It has on several occasions issued legislative mandates to the executive departments on the matter of subversive employees. An analysis of the general policy and procedure pursued in the executive branch in dealing with employees accused of disloyalty will involve largely the background, activities, and proposals of the two successive interdepartmental committees on employee investigations.

The First Interdepartmental Committee. In a section of the Hatch Act of 1939 Congress forbade any employee on the federal payroll to advocate the overthrow of the constitutional form of government in the United States or to be a member of any political party or organization which did. In the Emergency Relief Act of 1941 it forbade any alien, Communist, or member of a Nazi Bund organization to be employed and paid on any federal work project. To stimulate action in this area Congress included in the Department of Justice appropriation for the fiscal year ending June 30, 1942 (Act of June 28, 1941), a $100,000 item for the FBI to enable it "to investigate the employees of every department, agency, and independent establishment of the federal government who are members of subversive organizations or advocate the overthrow of the federal government."

In proceeding under this mandate the Attorney General at first ordered all complaints against employees alleged to be subversive to be referred to the agency which employed them for appropriate action and suggested that the FBI on request would aid in investigating the complaints. This plan did not work. The agencies concerned paid scant attention to the nearly sixteen hundred complaints referred to them. The FBI said that many agencies dealt with these complaints by asking the accused employee if he belonged to a subversive organization and by dropping the matter if he said he did not.

In October, 1941, the Attorney General ordered the FBI to deal directly with complaints against employees without reference to the employing agency. It conducted a factual investigation and made a report to the employing agency, which had full authority to decide whether to dismiss the employee or to retain him. The reports of the FBI were factual and made no recommendations. The departments, however, were inexperienced in dealing with such problems. They did not know which organizations were supposed to be subversive. They did not know how to interpret and use FBI reports. They were confused and uncertain about what procedure ought to be followed in order to protect the accused employee and also enforce the mandate of the law. There was a clear need for an advisory and coordinating agency.

To meet this need the Attorney General set up in April, 1942, an Interdepartmental Committee on Investigations.[1] The activities of this committee were as follows: It assembled and circulated memoranda clarifying the mandate of Congress regarding the membership of federal employees in sub-

[1] This committee was made up as follows: John J. Dempsey, Under Secretary of the Interior, chairman; Edwin D. Dickinson, Special Assistant to the Attorney General, executive secretary; Francis C. Brown, Solicitor of the Federal Deposit Insurance Corporation; Herbert E. Gaston, Assistant Secretary of the Treasury; and Wayne C. Taylor, Under Secretary of Commerce. Mr. Dempsey resigned in June and was not replaced.

versive organizations. It conducted a careful investigation of those organizations which were loosely referred to as "front" organizations because of the infiltration into them of communistic influence. Eventually reports on all these "front" organizations were sent to all employing agencies, accompanied with advice and caution as to the limitations upon the appropriate use of these data. It was emphasized that simple membership by a federal employee in a "front" organization created no clear presumption of subversive activity upon his part, nor were these organizations *per se* subversive. A further memorandum set forth the procedure followed by the FBI in its investigations and explained the nature and purpose of the FBI reports and how to use them effectively. Most important of all, the committee urged upon the departments the need for establishing sound procedure for reaching decisions exonerating or dismissing employees accused under the statute. This advice bore valuable fruit. The departments very generally adopted the practice of setting up a three- or five-man board to review reports made on their employees, to conduct suitable hearings, and to make recommendations. The committee advised that it could not conduct hearings in the cases of employees, but that on request it would review individual cases on the record and render a purely advisory opinion. No large number of cases was ever referred to the committee for advisory action. Finally, in six cases the committee dealt directly with charges against executive officers of federal agencies who had no immediate superiors to consider their cases and reported directly to the President.

On September 1 the Interdepartmental Committee made a report. This was transmitted by the Attorney General to the two houses of Congress, accompanied by a supporting letter of his own and by a report by the FBI upon the investigations of complaints against federal employees referred to it. The committee's report emphasized strongly the negligible results, statistically presented in the FBI report, of the laborious investigations which had been conducted. Charges against federal employees of subversive affiliation or advocacy had come from two sources: Mr. Dies had sent a list of 1,121 federal employees against whom complaint was made, and some 3,500 complaints came from other sources. The report showed that dismissals or other disciplinary action had been found suitable in three of Mr. Dies' cases and in forty-six of the others. This startling result came from the irresponsible use of the membership lists of the so-called "front" organizations. These lists were declared to be worthless as an indication of subversive affiliation or advocacy on the part of any individual member. Some of the Dies lists were nothing more than mailing lists used by "front" organizations, on which names of federal employees appeared without their knowledge or consent. The judgment of the committee and of the Attorney General was that the "loyalty" investigations had served no useful purpose, had cost a great deal of money, had diverted much energy from important tasks, and should therefore be abandoned.

The Interdepartmental Committee, however, did make some concrete proposals of real value. These were as follows: First, the "loyalty" investigations are not worth while as a broad personnel policy and should be discontinued. Second, if they are continued they should be rigidly limited to cases where there is substantial reason to suspect that an employee has violated a statute requiring his prosecution or his dismissal. Third, the Department of Justice should exercise extreme care in determining prima-facie cases for investigation. Such care would have weeded out ninety per cent of the complaints which the FBI investigated. Fourth, in the cases dealt with, the investigations should be exceedingly thorough and the identity and credibility of the informants on whose evidence the complaints rest should be made clear enough to permit the employing agency to appraise their reliability. Fifth, the departments should provide ade-

quate and fair procedures for reaching decisions upon individual employees. This procedure should give the employee an adequate opportunity to be heard in his own defense. Finally, a permanent interdepartmental board should be set up to which cases could be referred for advisory review on the request of either an employee or the agency which employs him.

The Second Interdepartmental Committee. The very obvious wish of the Interdepartmental Committee, the FBI, and the Attorney General to get rid of the heavy burden of "loyalty" investigations of federal employees was not gratified. In the Department of Justice appropriation act for the fiscal year ending June 30, 1943 (Act of July 2, 1942), Congress appropriated $200,000 to carry on the investigations. On February 5 President Roosevelt issued Executive Order No. 9,300, which created a new Interdepartmental Committee on Employee Investigations. Two members of the old committee carried over.[1] All of the new committee were full-time federal officials. It had no executive secretary, and its staff work was done in the Department of Justice. The functions assigned to it were all suggested by the experience of its predecessor. It was instructed to initiate measures best suited to expedite the fair and prompt handling of complaints against federal employees. It was to advise the employing agencies on the matter of procedure for reaching decisions with respect to accused employees, and it was to serve at the request of any agency as a reviewing board which would render an advisory opinion on any case referred to it. At the time of writing, the committee is in process of preparing a report which will indicate the scope and nature of its work thus far.

Valuable information about the committee's program and policy may be gleaned from its General Memorandum No. 6, sent to the various employing agencies of the government on September 1, 1943. This memorandum falls into two parts, the first of which covers the "scope of activity and statement of policy." Its salient points are as follows: First, the committee is concerned not with the general fitness of an employee to hold his position but with his membership in organizations which advocate, or his own advocacy of, the overthrow of government. Advisory opinions will be rendered only upon this question. Second, the federal statutes bearing on this matter will be strictly construed. Dismissal of an employee will be recommended only in abundantly clear cases. Past membership by an employee in a subversive organization will place upon him the burden of proving that the membership has been severed. Third, certain organizations are declared to be subversive and to advocate the overthrow of government by violence. Membership in any of these will require the dismissal of any federal employee. These organizations are (1) the Communist party and its affiliates, (2) the German-American Bund and its affiliates, (3) the Silver Shirt Legion of America, and (4) certain unnamed organizations dominated by enemy governments or enemy organizations. Fourth, certain "front" organizations are of such a character as to warrant the investigation of employees who are members thereof. It is emphasized that such membership is inconclusive and carries weight only in conjunction with other evidence. Fifth, the committee's own methods and procedure are summarized. The committee is unable to hear employees or other witnesses, but will render its advisory opinion solely upon the record presented to it. The committee will not recommend the dismissal of an employee except upon a record which presents abundant supporting evidence against him. It will not act upon "mere suspicion unauthenticated by credible evidence."

The second part of the committee's memorandum relates to procedure. It first summarizes the normal steps to be followed

[1] The members were: Herbert E. Gaston and Francis C. Brown from the first committee; Oscar L. Chapman, Assistant Secretary of the Interior; Rudolph M. Evans, member of Federal Reserve Board; John Q. Cannon, Counsel of Civil Service Commission.

in the case of any accused employee. The case arises on a complaint against the employee. The employing agency must refer such complaints to the FBI for investigation. The FBI investigates the case and submits a factual report to the employing agency. This report must not be shown to the employee. The agency must then do one of three things: first, exonerate the employee; second, prefer charges against him which, if sustained, would justify his removal; or, third, decide whether further investigation is desirable before taking either of these actions. In reaching any of these decisions the agency may seek an advisory opinion from the Interdepartmental Committee if it so desires.

The genuinely important part of the memorandum is the committee's carefully prepared outline of the procedure which employing agencies in the government ought to follow in deciding whether to exonerate or dismiss an accused employee. The committee's proposal calls for "a formal hearing before a competent board or committee of the agency, pursuant to procedures characterized by at least the following features commonly regarded as the minimum requisites to a fair hearing." The committee's proposal comprises eight points, as follows:

1. Formal charges against the employee should be made in writing in as particular detail as circumstances permit.
2. There should be a formal hearing at a time so fixed as to allow the employee adequate opportunity to prepare for it.
3. The employee should be notified that the charges, if sustained, will necessitate his removal.
4. The employee may be represented by counsel of his own selection. He may select this counsel if he wishes from the legal staff of the agency which employes him, its rules permitting.
5. The employee should be allowed to introduce evidence and witnesses in his defense. The agency which employs him may assist him in this and may aid him in securing depositions from persons not presently available as witnesses. He is bound to answer all pertinent questions put to him.
6. The hearing should not be governed by the rigid rules of evidence observed in a court of law, but should be conducted with sufficient freedom to permit the development of all pertinent facts.
7. The proceedings of the hearing should be fully recorded and copies of them furnished to the employee.
8. Findings of fact and a decision should be reached at the hearing, and these should be in writing. The decision, however, may be designated as tentative if the employing agency desires to refer the case to the Interdepartmental Committee for an advisory opinion. Such an opinion may be sought, in fact, at any stage of the proceeding at which the employing agency is required to make a decision. The employee is not accorded the right of appealing to the Interdepartmental Committee for a review and advisory opinion upon his case. This is a privilege reserved to the employing agency alone.

These proposals made by the Interdepartmental Committee are, of course, purely advisory. They could, however, be made mandatory upon the employing agencies through a presidential executive order, and it may be hoped that the President will take such action. Until he does so, the various agencies of the government still possess full authority to deal with their civil-service employees under the very flexible provisions with respect to removal contained in the civil-service legislation. A man may still be dismissed from his job for "the good of the service." He may still be dismissed because his superior officers suspect him of disloyalty, without recourse to any procedure according him a right to defend his reputation.

It should be noted that while the Interdepartmental Committee is powerless to compel the departments to employ decent procedure in the dismissal of employees accused of disloyalty, it is equally powerless to

dismiss such employees itself. It can issue no binding order of any kind and can secure compliance with its recommendations only by persuading the President to intervene directly.

Congress has not appropriated further funds for the continuance of employee investigations. On July 1, 1943, the Attorney General made a report summarizing the investigations which had been conducted through that date, reiterating his earlier adverse opinion upon the utility of the whole project, and stating that since no funds had been appropriated for the purpose "further investigations of this character will not be undertaken unless otherwise provided by law." This does not mean, so far as is now known, that the Interdepartmental Committee will be discontinued. There will continue to be complaints filed against individual employees as long as the present statutes forbidding the employment of "subversive" employees remain in force. Since this is true, there is a steadily useful purpose to be served by the Interdepartmental Committee or some similar agency set up to exercise supervisory influence over the handling of cases of this type.

Civil Service Commission Investigations

THE third major federal agency which concerns itself with the loyalty of federal employees is the United States Civil Service Commission. Its task in this area is unique for two reasons. First, the Commission is only concerned with the loyalty of those employees who have not yet been permanently certified as members of the civil service. Second, it deals with an enormous number of persons, not on complaint, but as part of its routine work. Its management of this problem has been criticized from time to time by those who object to the policy which controls the Commission's handling of loyalty examinations and to its administration of that policy. The salient facts about the work of the Commission which are necessary to an appraisal of these criticisms are as follows.

The jurisdiction of the Civil Service Commission is more limited than is commonly realized. The Commission is the agency through which a person enters the federal service on a permanent footing or enters a new job or classification by transferring from one agency to another. When the Commission gives a person a rating and certifies him to be eligible to federal employment, its jurisdiction over him ceases. Contrary to a widely held impression, the Commission cannot thereafter dismiss him unless it appears that he secured his certification through fraud or wilful misstatement of facts. In short, if a federal employee is once *in* the service, the Commission has no power to get him *out*. If it later turns up evidence of his unfitness, it can merely pass this along to the agency which employs him. It does not search for such evidence but sometimes acquires it collaterally in the course of its regular investigations.

The impression that the Commission *dismisses* federal employees arises from the fact that, owing to the large numbers involved, most federal employees are admitted into the service on a temporary basis *subject to later investigation and certification* by the Commission. The appointments are made on this understanding. If later the Commission's regular investigation of these persons shows them to be "unsuitable," the Commission will order them dropped. The employing agency may appeal to the Commission to reconsider the case, but it has no power to override the Commission's ruling of ineligibility. Should it attempt to do so, the Commission would certify to the General Accounting Office that the employee was holding office in violation of Civil Service Rules and Regulations, and that office would then take the necessary steps to ensure that his pay was stopped. It has never been necessary to do this. Unfortunately, a considerable period of time may elapse before a case scheduled for investigation is actually reached, the investigation completed, and the case closed out. Some types of cases are closed out in thirty days. These cases involve

positions clearly related to the war program. The average time is about six months. In an extreme case a man may be on the federal payroll for a year or more before he is finally "certified" by the Commission. By that time he has acquired most of the sensations of a permanent employee, and his removal through failure to "certify" is very like an actual dismissal except in its legal aspects. It should be noted that the Commission's jurisdiction over an employee is revived when he transfers from one agency to another. He becomes legally an "applicant" again and subject to reinvestigation if the Commission thinks it advisable.

The size of the job which the Civil Service Commission does is an important factor in forming any opinion about its work. The Commission has 2,700,000 posts in the federal service under its jurisdiction. Loyalty examinations of applicants began in September, 1939. This procedure followed the passage of the Hatch Act, already discussed, which forbids the employment of persons who advocate, or who are members of organizations which advocate, the overthrow of constitutional government in this country. After our entrance into the war the loyalty examinations were stepped up and became especially searching with respect to positions classified as "war work." These war jobs are a fairly small part of the total, and their designation is arrived at by mutual discussion and agreement between the Civil Service Commission and the employing agency.

The numbers of "character" investigations, which may or may not include special loyalty investigations, conducted by the Commission has mounted sharply. During the fiscal year ending in June, 1941, 13,921 of these investigations were closed out. This total jumped to 55,636 and then to 85,751 in the next two years. Of the 85,751 persons investigated last year, 12,024 were ruled "ineligible" by the Commission for all causes. The chief causes were wilful misstatements, perjury, prison records, and incompetence. Of the 12,024 not "certified," 334 were denied eligibility solely on grounds of disloyalty; and of these, 115 were applicants for employment in the Pearl Harbor Navy Yard, with respect to which the loyalty tests were exceptionally searching. In March, 1943, Commissioner Flemming told a House committee that since the beginning of the war effort there had been 654 refusals by the Commission to certify an employee on grounds of disloyalty. The Commission conducts its investigations through a present staff of about 600 investigators. It has lost some 200 investigators during recent months. The Commission aims to bring this staff to 750 and regards 850 as a desirable number.

It is not easy to summarize the policy of the Commission with respect to these loyalty investigations with any assured sense of presenting it with entire accuracy. The following facts, however, seem undisputed. The Commission's policy stems from the mandate imposed on all employing agencies of the government by the Hatch Act. Whether without this the Commission would have instituted loyalty investigations is irrelevant speculation, since the Commission feels that it was given a clear directive by Congress. The Commission is guided in its handling of loyalty cases by the principle that doubt as to the loyalty of an applicant for federal employment will be resolved *against* the applicant.

John Q. Cannon, formerly Counsel for the Commission, and now a member of the Interdepartmental Committee on Employee Investigations, told the writer that the Interdepartmental Committee would require a stronger case to recommend the dismissal of an employee than the Commission would require to deny him a certificate of eligibility.

The policy of the Commission with respect to membership of applicants in "front" organizations is stated by officers of the Commission to be essentially the same as that of the two interdepartmental committees. Membership alone in a "front" organization is not a criterion of disloyalty. Such member-

ship merely becomes part of the record and is considered along with other relevant facts about the applicant. The commission investigations revealed that many liberals had joined "front" organizations without any thought of aligning themselves with Communism and, in some instances, in order to fight Communism, and these persons were certified for federal service.

In a recent unpublished memorandum the Commission states its policy in these words:

> . . . the Civil Service Commission will not consider charges against persons who are found merely to possess a progressive interest in seeking changes in the country's economic and political structure but who adhere firmly to the principle that such changes are only to be brought about through orderly democratic processes.
>
> On the other side of the picture, there have evolved certain fairly well-defined categories, where, assuming adequate evidence, a negative conclusion follows. Typical of these latter categories are the following:
>
> Persons who have advocated revolution or the use of force, if necessary, in order to bring about political or economic changes.
>
> Persons whose association with organizations in agreement with the attitudes and policies of the Nazis, Fascists or Communists, has been such as to indicate sympathy with the programs of the Nazis, Fascists or Communists.
>
> Persons who have expressed a desire to see the Axis nations emerge as the victor in the present conflict.
>
> Persons whose record shows that they are more concerned with the success or failure of a foreign government or a foreign political system than with the welfare of the United States Government.

Recently the Commission's handling of disloyalty cases has been sharply attacked on the ground that the examiners who assemble information about applicants ask of their informants stupid, irrelevant, and offensive questions which reflect an illiberal policy which would disqualify persons for government service on the basis of cosmopolitan associations and liberal political and economic opinions.[1] Officers of the Commission are keenly conscious of these criticisms. They doubt the occurrence of the incidents reported in these critical articles and state definitely that such abuses violate Commission policy and the instructions given to Commission investigators. They state, further, that if their attention is called to specific cases where it is alleged such incidents have occurred, they will make a vigorous investigation and, if the facts bear out the allegations, that they will take appropriate disciplinary action.

Through the courtesy of one of the commissioners the writer was permitted to examine the current *Manual of Instructions* issued to the Commission's investigators. In 150 pages of minutely detailed instructions there appears nothing which could possibly be stretched to authorize the objectionable questions commented upon in the recent articles in *The Nation*. The instructions specifically forbid investigators to question applicants or witnesses about any matters relating to politics, race, color, religion, or union or fraternal affiliations. Questions about political affiliations may be asked of or about applicants who have been affiliated with any organization or party which advocates the overthrow of this government by force and violence. Also, questions will be asked about membership in a Communist or Nazi Bund organization, or about any "subversive" or "popular front" organizations with which the applicant has been affiliated in the past. The impression gained from a study of the instructions was that if the Commission's investigators do a poor job it is because they are poor investigators and not because they have poor or vicious instructions. An able and fair-minded investigator who follows his instructions closely and intelligently should incur no criticism. One of the commissioners states further in a letter to the writer that "the investigators in charge of the work in our regional offices are told specifically that in instructing the investigators they are to instruct them not to ask questions about affiliations with such organizations as the

[1] See "Washington Gestapo," 157 *The Nation* 64-66, 92-99 (July 17 and July 24, 1943).

American Civil Liberties Union, Lawyers Guild, Washington Book Shop, and all organizations which supported the Loyalist cause in the Spanish Civil War."

The Commission's recent memorandum referred to above sets out in detail the procedure followed in the "loyalty" cases handled by the Commission. The chief steps in this rather elaborate procedure are as follows: (1) The applicant is subjected to a routine character examination by a staff investigator who makes a written report. (2) If this investigation develops derogatory information, the applicant is given a 'special hearing' at which he is presented with the derogatory information, answers questions, and may bring in rebutting evidence of statements which become part of the record. He may have a record of this oral hearing, and may comment on its correctness. (3) The record and hearing go to the rating board for study and recommendation. This board makes a tentative recommendation, either favorable or adverse. (4) If the recommendation is adverse and is grounded on a disloyalty charge, the case automatically goes to a special board of three members who analyze the record and make a recommendation which is transmitted to the Executive Director of the Commission who, after adding his own recommendation, transmits it to the Commission itself. (5) The full Commission reaches a decision on the case on the record and takes the appropriate action. (6) A decision adverse to the applicant may be appealed by him to the Board of Appeals and Review. This board examines the record and may report a decision to the Commission. On request or on its own initiative it may hold a hearing of the case. Requests for hearings are, in fact, never denied. The applicant is given a thorough opportunity to present his case and may be represented by counsel. The board's decision based on the hearing goes to the full Commission for action. (7) The Commission makes a final decision, although it will look into the matter further at an informal hearing which it will hold at the request of the applicant or of any employing agency. There is no appeal from a final ruling of the Commission to any other executive authority.

The following comments and suggestions are made with a view to meeting current criticism of the Commission's work in this area. First, the Commission should clarify its working tests of loyalty so that they have sharper edges, and this clarification should move in the direction of realism by the virtual abandonment of the discredited tests of membership in the so-called "front" organizations. Second, the Commission should improve its public relations by revealing more fully its management of controversial problems, such as the loyalty investigations. Much loose talk results from ignorance which should be dissipated. The Commission should make clear that its policy in loyalty cases does not include indirect assault upon freedom of political and economic opinion. The indiscretions of stupid and brutal investigators should be publicly disavowed. This might be done by calling public attention to the objectionable things which these agents are *forbidden* to do even if it seems unwise to release their full instructions. Third, at the very beginning of the investigations a stern test should be set up to determine a prima-facie case of disloyalty justifying further inquiry. If only 334 persons out of 85,000 are found "unsuitable" because of some kind or degree of disloyalty, it looks as though a good many cases might have been headed off at the outset. This is the same suggestion which was made by the first Interdepartmental Committee, which felt that ninety per cent of the loyalty complaints referred to the FBI were too thin to warrant investigation. Fourth, the procedure followed by the Commission seems to protect adequately the interests of the applicant for federal employment. One is led to wonder whether it is not a little overelaborate. Were it possible to reduce the docket of loyalty cases by the stricter prima-facie tests just mentioned, it is possible that the procedure might be simplified without sacrifice of either efficiency or fairness.

Conclusions and Proposals

THE writer's general conclusions regarding this whole problem and the proposals he feels justified in making can be stated briefly.

First, the enforcement of loyalty tests of employees in the federal service by Congress or its committees is unconstitutional and tends to deteriorate into witch-hunting and flagrant denials of justice. It should be completely abandoned.

Second, the test of loyalty or disloyalty should be clarified. Discretion now rests in hundreds of different hands to define and apply tests of "subversive activity." These tests need to be sharpened and standardized. Congress could do this by saying plainly just what it regards as "subversive activity" and by forbidding the enforcement of other and stricter standards. If Congress does not act by law to accomplish this, the President should do so by executive order covering all agencies and departments under his authority.

Third, the tests of "subversive activity" thus worked out should have the definiteness of a well-drawn criminal statute; they should be designed effectively to dispose of the bogey of "front" organization membership.

Fourth, removals from office on grounds of alleged disloyalty should be made possible only through uniform procedures followed in every part of the government service. This objective should be effected by executive order of the President making such procedure mandatory upon all employing agencies under his authority.

Fifth, the procedure established for this purpose should adequately protect the rights and civil liberties of the accused employee and give him ample and public opportunity to clear his reputation if he can. This procedure might be patterned after that proposed by the Interdepartmental Committee in its recent departmental memorandum outlined above. The procedure, however, should give the employee as well as the employing agency the right of appeal to the advisory reviewing board.

Sixth, there should be created a permanent advisory appeal board to review cases of disloyalty and make recommendations thereon. This board should be composed of eminent and respected citizens not otherwise connected with the government. It is no reflection on the present Interdepartmental Committee to say that the chief value of the proposed board would flow from the already established public confidence in the distinction and integrity of the members. Such a board would be a continual reminder of the fact that important issues of civil liberty are involved in these disloyalty cases and that those civil liberties are being carefully safeguarded. It might not be feasible to allow appeals to go as a matter of right to the proposed advisory appeal board from the decisions of the Civil Service Commission in disloyalty cases. But even here some procedure analogous to certiorari might be devised which would permit the board itself to call up cases from the Commission for review when there was any prima-facie showing of injustice or when any important question of public policy was involved.

The writer believes that these proposals would contribute to the efficiency and essential fairness with which we ought to manage a problem which so intimately affects important civil liberties and the principles on which our democracy rests.

The Parliamentary and Presidential Systems

By DON K. PRICE

Public Administration Clearing House

TO KEEP the administration of government under the control of the people, to invigorate it for effective action in their behalf, and to adjust national policy and its administration to the needs of various regions and institutions—these are urgent problems in this time of crisis.

While in Great Britain as well as in the United States new political and administrative institutions are being worked out to meet the needs of the hour, it is curious that much of the academic and journalistic criticism of government in America is based on a desire to imitate the classic parliamentary system of government. This is all the more curious since the British long ago abandoned the classic parliamentary system as definitely as they abandoned the classic theories of political economy.

Perhaps only a psychoanalyst could explain America's peculiar nostalgia for the obsolescent political institutions of the mother country, but the persistence of her obsession with the parliamentary system makes it not only an interesting theoretical problem but a practical political and administrative issue.

It is easy to understand why Woodrow Wilson started the fashion. When he wrote *Congressional Government* as a graduate student (even before he ever set foot in the United States Capitol), the memory of Johnson's impeachment and the scandals of Grant's administration were fresh in his mind, in sharp contrast to the leadership of Gladstone and Disraeli over the House of Commons that they dominated and the electorate that they were creating. And he had ~~undoubtedly~~ read Walter Bagehot's monumental study, *The English Constitution,* which gave the classic description of the parliamentary system.

Bagehot pointed out in 1867 that the term "Her Majesty's Government" had become only a polite fiction, although a very useful one. Under the parliamentary system, which he preferred to call Cabinet government, the executive and legislature were not independent of each other as in the American presidential system; the House of Commons virtually elected the Cabinet and could force it to resign whenever it lost confidence in its policies or its efficiency. Thus the executive was always responsible to the legislature, and through it to the people. On the other hand, the executive was assured of enough power to discharge its responsibility because, if the House refused to vote funds and enact laws as it recommended, it could dissolve the House and call for a new election. "It" meant the Cabinet, the Government of the Day, the committee of legislators who individually served as ministers of departments and collectively were dismissed if the action of any one of them was not supported by the House. Thus the parliamentary system provided immediate political responsibility and at the same time gave the executive enough power to make all special interests balance into a coherent national policy.

Wilson found this system far preferable to the presidential system, which seemed to encourage continual squabbles between the executive and the Congress. Senator Pendle-

ton, the author of the civil service reform act, had proposed several years before that the President's department heads be given seats in Congress, in order to defend their administration before the legislators. The idea of adopting an outright parliamentary system by constitutional amendment or of giving Congress or its committees some sort of control over the appointments of department heads has persisted, and is stronger now than it has been for many years.

"If we had a parliamentary form of government," says Mr. David Lawrence, " . . . we would be able to hold to accountability all the various bureaucrats who nowadays do as they please under presidential appointment." Mr. Lawrence is one of many who have followed the lead of Mr. Henry Hazlitt, of the *New York Times,* who wants us to adopt a parliamentary system by constitutional amendment. Others are for limited action. Mr. Walter Lippmann has suggested that "when the voters turn against an administration in midterm, the cabinet officers responsible in the field where the issue was drawn will as a matter of course resign," since a department head "has lost his usefulness when he no longer has the confidence of the people's representatives."

Supported by this assumption that members of Congress are representatives of the people while the President is not, that Congress should govern while the President should be restrained as a threat to our liberties, some members of Congress have undertaken to pinch off bits of the executive function. Representative Hendricks helped kill the National Resources Planning Board, while trying to create a House committee on postwar problems, because he thought that Congress should be doing the planning. Senator Tydings has suggested that Congress and not the President should control the Budget Bureau. Senator McKellar wants more executive appointments "confirmed" by the Senate. Congressman Ramspeck does not believe that administrative officials should remain in office unless approved by a majority of the people, by which, unless he means to propose a popular referendum on each official, he must mean a majority of Congress or one of its houses or committees.

This tendency is not supported as a whole by anybody in particular, or opposed by anybody in particular. It simply goes on because we use terms and ideas, in thinking about the President's relations with Congress, that we have borrowed from the British. Congressmen are supposed to represent the people, while the President is not, because the British House of Commons is elected while the British King is not. Department heads are not supposed to be responsible unless a legislature can discharge them. We, the people, could hold ministers responsible through a legislature, but we, the people, look on a President's appointees as bureaucrats—especially if we do not happen to like the policies they carry out with money voted them year after year by Congress.

But perhaps the facts on which Bagehot based his logic are no longer so. Perhaps the classic parliamentary system, even though it were ideal for Great Britain, might not fit the United States. Perhaps the United States should consider its system of legislative-executive relations in the light of the world as it is today and may be tomorrow. To do so it will have to ask some critical questions about the classic theory of parliamentary government.

The Legislative Function

MUCH of the sentiment for the parliamentary system in the United States springs from a dislike of executive influence over legislative proceedings. For this reason it is pleasant to recall that in Great Britain "must" legislation is always enacted and very few other statutes are, while the "purges" of party members who refuse to follow their leaders are almost always successful.

In the British system the nice balance between the Cabinet and the Commons has long since been upset. A half-century ago it was not too unreasonable to argue that the power of the House to dismiss the Cabi-

net, balanced against the power of the Cabinet to dissolve the House, would always result in a perfect balance of democratic control and executive authority. Within limits, the system worked that way; the Cabinet could never outrage public opinion for fear of losing the support of the House, the members of which went home every week end to get the opinion of the county families if not of the people; the House would never yield to minority interests, for the Cabinet would have the House dissolved if defeated on a policy question, and the members, not wishing to risk their seats in a general election, would not vote against the Cabinet. The equation balanced until a new factor—the electorate—became continuously instead of only potentially effective.

The British in effect did to the House of Commons what the Americans did much earlier to their Electoral College: they made it an automatic machine for registering the vote of the people, as organized into parties, for a Prime Minister. Once the Prime Minister is in office, with the Cabinet that he selects, the House remains in session to enact the bills proposed by the Cabinet, to vote the funds requested by the Cabinet, and to serve as the place where Cabinet ministers make speeches for the newspapers to report to the public but rarely remain to listen to the speeches of other members.

In theory, the House has the power to turn the Cabinet out of office or to refuse to enact the laws it proposes. But that constitutional power seems to be going the way of the King's power to appoint ministers and to veto legislation. Theoretically it exists, but politically it is rarely exercised. Since 1895 only two Cabinets have been refused a vote of confidence and turned out of office by the House, and neither of them had majority support to begin with. A political machine does not elect men to vote against its boss, and the Prime Minister is leader of the party and boss of the machine.

By invading and taking over the executive power the House of Commons destroyed its own independence. The very privilege of holding the Cabinet responsible makes it impossible for the House to think independently. No members of the House will accept office and serve in the Cabinet if the House will not support them. After taking office they will not accept defeat by the House without dissolving the House, calling for a new election, and appealing to the voters to return members who will support them. Because this is constitutionally possible, the members of the House who select and support a Cabinet put the desire to keep their men in office ahead of all minor considerations. The party machinery therefore controls the members fairly rigidly; if the Cabinet wants a measure passed, it will be passed, according to the schedule of debate which the Cabinet considers expedient. As soon as the House of Commons took away the power of the House of Lords by the Parliament Act of 1911 it had to surrender its independence to its leaders; in the cautious words of Sir William Anson, on that date "legislative sovereignty may be said to have passed to the Cabinet."

The day of the independent landed gentry, holding seats in the Commons as a matter of family privilege, is gone, and the discipline of parties, especially of the Labour Party, over their members goes far beyond American practice. There is no tradition that a legislator should live in his own district in Great Britain; it is a matter of course to elect a candidate who never visited the district before in his life. The party leaders could therefore defeat nearly any of their members in his own constituency by withdrawing their support, or even by sending in a strong national leader to oppose him. The "purge" of members who do not support the national organization is taken for granted, but members are generally cooperative enough to make it unnecessary.

This control by party machines over the political fortunes of members is a corollary of the similar control by the Cabinet over the legislative procedure. The Cabinet takes for its legislative program just as much of the time of the House as it needs, and during

the 1920's and 1930's that was about seven-eighths of the total. The remainder went to consideration of measures proposed by private members (private members are all those except the seventy-odd members who are a part of the "Government" as ministers or assistants to ministers), who drew lots for the privilege of getting their bills considered by the House. No private member's bill could be passed if the Cabinet opposed it, and in practice private members who drew the right to introduce a bill would often ask the Cabinet (or its Whips) for a bill to introduce. Since the war, however, the time allotted to private members has been entirely abolished; no bill can be introduced except by a minister.

The House of Commons has no committees, in the sense that Congress understands that term. At one stage a bill is referred to a committee—one of several large committees which do not deal with any specialized subject matter, which do not have any fixed membership, and which have no initiative or influence whatever of their own, being little more than devices to permit interested parties to testify. Funds are appropriated and statutes enacted without any independent review, and as the Cabinet requests.

The House votes the funds requested by the Cabinet; it does not have the constitutional power to vote more money for any purpose than the Cabinet asks for, and it has never during this century voted any less. In theory the private member may offer amendments to legislation proposed by the Cabinet, but in practice, as Mr. W. Ivor Jennings puts it, "Members appeal to the minister to accept amendments; they do not compel."

In short, through the party machinery the Cabinet controls the House of Commons on every question that is important enough to be called policy, and it *must* control the House as long as it is "responsible" to the House. The British short-cut the House of Commons to elect their executive as effectively as American voters short-cut the Electoral College. But between elections, since they have reduced their legislature to a voting machine under the control of the Cabinet, they have to rely on the executive to take complete charge of legislation, restrained and guided effectively only by public opinion as it is expressed through the press and through a multitude of private organizations as well as in the House. This is what Mr. Lloyd George meant when he told a Select Committee on Procedure on Public Business in 1931 that "Parliament has really no control over the Executive; it is a pure fiction." (This Select Committee of the House of Commons heard extensive testimony on the operations of the parliamentary system; its proceedings will be described more fully hereafter.)

Now "control" has at least two meanings. One is to restrain or check, and the House of Commons, by acting as a sort of barometer of public opinion (though not the only one, and perhaps not even the most important one) certainly exercises an effective though impalpable restraint on the Cabinet. The other meaning is to direct, and in this sense of "control" Mr. Lloyd George was right in saying that the House does not control the Cabinet. For the essence of the cabinet system is that the Cabinet must be supported on every issue not only by a majority but by the *same* majority. If the Conservatives are in power, the Conservative member dares not vote against the Cabinet on any issue even if he disagrees, because if he and others like him do so they might make up a majority against the Cabinet and force it to resign. Likewise, the Labour Party member cannot afford to vote with a Conservative Cabinet even if he approves of one of its actions, because that issue might be his own party's chance of getting into power. This line of reasoning and the type of party discipline that it brings about makes independent voting extremely rare. The idea that a major tax bill could be passed with a majority of the administration party against it and a majority of the opposition party for it would be unthinkable in Westminster.

The merit of this arrangement is that it makes impossible a national policy that seems inconsistent to the Cabinet or the Prime Minister. If two groups of members of the House, even two majority groups, want the Cabinet to follow policies that the Cabinet considers inconsistent, they cannot have their way. To take a hypothetical example, if a majority of the House wished to protect a system of private enterprise, but also wished to build a public power project in a certain depressed area, it would not be able to do so if the Cabinet considered the two purposes inconsistent.

From one point of view, this system brings about an admirable coherence of policy; if a Cabinet is engaged in carrying out a certain program, it has a right to insist that its responsibility not be hampered by the enactment of measures that are inconsistent with it. But, from another point of view, the issue whether certain policies are consistent with each other is the most important issue to be decided, and the most important issue ought to be decided by the supreme authority. And if a Cabinet should tell the House that it could not be held responsible for (for example) the encouragement of private enterprise if the House should insist on building a public power project, it would be putting its view of administrative practicality ahead of the legislature's view of public policy. The system that lets it do so puts the Cabinet over the House for most practical purposes, no matter which body elects the other.

In practice, a legislature cannot exercise control or take an independent line unless it can set up committees to make investigations and recommendations. Under the parliamentary system, the Cabinet is the committee to end all committees; it can tolerate no rivals. It can let other committees conduct investigations and hearings or propose minor amendments, but on any question that a minister chooses to consider policy the House must fall into line. This lets the Cabinet define the scope of "policy," and it is not inclined to leave any controversial issue of importance outside the definition that it formulates.

This difficulty was brought out clearly in the testimony to the 1931 Select Committee. Several members proposed that the House create specialized committees and that the Cabinet refrain from considering every question a question of policy, but they were apparently unable to convince the Select Committee that a committee could do anything significant without supplanting the minister concerned. As one of them asked Mr. Lloyd George, "do you not think you would get back to exactly the same position we are in now, that if the Minister and the Cabinet supported the Minister in one line and the Committee took another you might have a more interesting debate, but ultimately the decision would rest with the Cabinet, and you would not really control your Executive?" Even Mr. Lloyd George could think of no formula (within the limits of the Cabinet system) which would let a committee successfully oppose the Cabinet on policy. Everyone assumed that "ultimately the decision would rest with the Cabinet."

Thus the House cannot itself make decisions on the several major issues of policy that exist at any one time; constitutionally it can only choose which Cabinet to entrust those decisions to, and as a matter of practical politics it can only keep in office the men it is elected to keep in office.

What is true of policy is even more true of administration. The outlines of departmental organization are fixed by Cabinet action, without legislation, and so are the principal procedures of management, such as budgeting, planning, and personnel. The Cabinet itself now operates through a hierarchy of committees and subcommittees which have no hard-and-fast membership and no formalized existence; any decision on which agreement cannot be reached by common consent is passed on up the line to the War Cabinet, to be settled in the last analysis by the Prime Minister. The freedom of the Cabinet to handle administrative ques-

tions with this degree of independence undoubtedly makes for a high degree of coordination.

It is no wonder that even Mr. Stanley Baldwin admitted to the Select Committee in 1931 that (in Mr. Hore-Belisha's words) members of the House of Commons felt that they had "nothing much to do of a responsible nature." This lack of function was reflected in practical arrangements. The prewar House had enough seats for only about half its members. Most of the members carried on their other occupations by day, and to let them do so the more important sessions of the House were held in the late afternoon and evening. As Sir Austen Chamberlain complained, the leading Cabinet members, who in the nineteenth century would have spoken at the climax of debate at 11 o'clock and then waited to hear their opponents, had taken to reading their speeches (usually prepared for them by others) early in the evenings in time to be reported by the morning papers and then leaving the House immediately, so that debate, "the essence of Parliamentary government," had become a lost art. Members could not make up for the decline in debating by detailed work as members of committees, for the committees had no independent function. As individual members they were not expected to make any great contribution, or even to work full time. The members were not paid at all until 1911, and in 1937 they were raised to £600 ($2,400) per year—a salary one-fifth that of the top rank of civil servants. The only private accommodation each member had was a locker in the corridor. On this point, one member of the 1931 Select Committee remarked in what must have been a wistful tone of voice, "I think that in the American Congress every Member has a small room."

In this contrast, the accommodations that the Congressmen enjoy are significant of their function. Congress, since it has not taken over control of administration, has not had to feel responsible as an organization for getting the work of government accomplished. For that reason it has not had to organize itself into a tightly disciplined body, controlled by a single small committee that can act in a businesslike way. If it should do so, the individual members would have to surrender to their organization the individual freedom of action and decision that now enables them to criticize and restrain at their discretion even an administration that they generally propose to support.

During the Napoleonic war, according to Lord Mountararat in *Iolanthe,*

> The House of Lords throughout the war
> Did nothing in particular
> And did it very well.

The House of Commons, which was forced by the bombing of its own quarters to move into those of the House of Lords a couple of years ago, has succeeded to the role which Mr. W. S. Gilbert described with his usual precision of language. The House of Commons has influence, it does an important job, and it does it very well. But it does not control things "in particular." Its control has become so general, it is exercised through so rarefied a medium, that the Commons seem to be following the Lords into the status of one of the "theatrical elements" of the British constitution.

The Executive Function

DURING the past century the British have had the problem of bringing under popular control a civil service that was formerly under royal domination, while the Americans have had the totally different problem of creating a national administration devoted to the national service rather than to factional or particular interests.

The tenure of the civil service, like the sovereignty of the King, was undisturbed by the British as they converted themselves into a democracy. This feat was unique; no other major power managed to become a democracy without a revolution, and some countries backslid even after a revolutionary conversion. But the British conversion was accomplished so subtly that the theories

which describe and justify it will hardly fit the countries that became democracies by more forthright methods.

A democratic country has two problems in controlling its public service: how to get it to do what the people want, and how to keep it from doing what the people do not want. One is the problem of avoiding red tape and lethargy; the other, of preventing oppression.

Americans have been so long accustomed to using the British civil service as an example of rectitude and impartiality while reproaching their own government for partisan patronage that it is a little disconcerting to them to read that the British are showing considerable dissatisfaction with the record of their administrators during the present war and the years before it. This comes as no surprise, however, to those who have been following the self-criticism of British statesmen for some years. In 1931, the Permanent Undersecretary of State for the Colonies, Sir Samuel Herbert Wilson, complained to an official commission that the higher civil service had all the negative virtues, but was static, unadventurous, inflexible, and impractical. Similar criticisms have been made many times before and since. There may be room for disagreement on a question of degree, but the more ardent defenders of the permanent officials who are administrative heads of departments under the ministers say that their primary qualities are "stoical realism" or "moderation and prudence," while the severer critics of these gentlemen say they are merely cynical opportunists. Fervor and enthusiasm, at any rate, are not their primary characteristics.

Some Labour Party critics of the civil service are apt to blame its caution on the economic predilections and the family and educational backgrounds of its leading members. Even though many of the most vigorous advocates of the social services came from just such English backgrounds (Sir William Beveridge was educated at Charterhouse and Balliol in classical literature and philosophy), there is much in this explanation. But it is not the whole story; it will not explain, for example, why Oxford University and the headmasters of public schools have reported that the more energetic and ambitious men among their better graduates were avoiding the civil service for more adventurous occupations, or why some of the more energetic and ambitious men who reached the top of the civil service between the two world wars left the government to go into private business, like Sir Josiah Stamp, or into politics, like Sir John Anderson. All Englishmen take the parliamentary system for granted, like the air they breathe; perhaps they overlook a tendency of the system itself to overdevelop the caution of the civil servants?

The parliamentary system, for one thing, requires a permanent civil service. This requirement fits in with British tradition, but it is also inherent in the institutional arrangements. For given the constitutional possibility of an unexpected change at any time in all the ministers who head departments, it is necessary to have the departments staffed by men who can carry on the job. It is unsettling enough to change the chief executive at stated intervals, but when change may come at any moment permanent tenure is necessary both to keep the work going and to attract first-rate men to the jobs. Thus, in normal times, it is difficult under the parliamentary system and unheard of in British practice to bring men in from universities or private business to high administrative positions in the government departments. The top administrators are recruited as they leave the universities and spend all their lives in the government offices in Whitehall.

For another thing, the parliamentary system puts the ministers and the top civil servants on the defensive. The minister is primarily a legislative leader, not an administrator. He is normally chosen for his ability in commanding the support of members of the House and in defending party policy before the House. He must therefore have distinguished himself in debate or by leader-

ship in the party organization. If he has done so, it does not matter much which department he heads, and it is quite customary for him to change from one department to another. The minister, from the historical point of view, has elbowed himself into a spot between the King and the civil service, a spot which he occupies as a representative and one of the leaders of the House. In this spot he must agree to take the blame for anything that his department does wrong, in exchange for getting the credit for anything it does right. This is necessary to safeguard the permanence of the civil service; it is a tacit arrangement between the Cabinet and the civil service that the civil service will always obey the Cabinet ministers and let them be considered responsible for whatever is done, in exchange for a virtual guarantee of undisturbed tenure.

Unless the minister has an exceptional interest in a certain policy and exceptional determination, he is likely to insist above all things that his subordinates keep him out of trouble. His eye is always on the political barometer of the House; if he can avoid doing anything that will cost the Cabinet any undue criticism or loss of votes, he will be a success among his colleagues. Whether he is more concerned with a positive program or with political protection, however, it is pretty clear to civil servants in his department that they stand to lose more by making mistakes for which the minister may be called down than they stand to gain by initiative and enterprise for which their superiors would probably get most of the credit anyway.

Official caution is common to all large organizations to some extent, but the essential feature of the parliamentary system serves to intensify it. Because any decision on a question of policy may be discussed in the House as an issue on which (at least in constitutional theory) the minister's job will depend as a result of a vote on party lines, every policy question is potentially the cause of a general election. A British civil servant simply must remain noncommittal on policy questions in order to keep out of party politics.

For this reason, a civil servant must not publicly take credit for anything he proposes or accomplishes; the minister has to take the credit or blame in order to give the "ins" and the "outs" in the House of Commons a fair chance to debate a possible vote of confidence on the question. Moreover, the civil servant must anticipate serving under other ministers. A Permanent Secretary of the Treasury who is serving under a Conservative Chancellor of the Exchequer today may be under a Socialist one tomorrow—or under the parliamentary system he must at least pretend to think so. Accordingly, he may not write or say anything publicly that might embarrass him or his political superior if he had to change policies.

The minister's role is much like that of the chairman of a congressional committee in the United States, except that he probably has not had the long service in a single subject matter that the congressional seniority system requires. His time is taken up so much with political and legislative affairs that he cannot serve as the administrative chief of his department. That role falls to a permanent undersecretary, assisted by a number of staff assistants who, like himself, were recruited after a classical education and trained in general administration. The advantages of having men with a general administrative interest in the top positions of a department are only beginning to be appreciated in the United States. But, except for the peculiar needs of the parliamentary system, it is something of a disadvantage to have a public service headed by men who have had to restrain most systematically their political and social ideals in order to be acceptable to any political group that might come to power.

British statesmen and students have made two interesting proposals to make the civil service less inbred, but neither has been adopted. One is to make a special arrangement to give young civil servants some experience outside the government, or at least

outside the capital, so that they will have a better appreciation of the thinking of the private citizen and a keener interest in practical problems. Another is to devise some scheme by which civil servants could be recognized publicly by the Cabinet or the House for specific achievements, as well as honored by the Crown for their general service.

No artificial measures are needed to accomplish these purposes under the presidential system. The United States has a constitutional series of Four Year Plans, during each of which the President can assure his subordinates of a chance to make a record for themselves. Since the President is to be in office for four years and has control over the tenure of his subordinates, he can call to the government service men from private business, universities, or state and local governments. This process keeps the federal service from becoming a closed corporation; it always includes men with a wide variety of prejudices and it has never developed a guild spirit.

American department heads themselves have a function and status quite different from that of parliamentary ministers. The use of the term "Cabinet member" to refer to both is extremely misleading. The American department head is chosen for executive ability or leadership in a certain field of interest, not for legislative influence. Only one President's Cabinet since the Civil War has had a majority of ex-Congressmen. The ex-Republicans who were in the Roosevelt administration even before the war illustrate the President's selection of department heads for their leadership in subject matter rather than in party politics—Wallace in agriculture, Hopkins in welfare, Ickes in conservation.

The administrative official in the United States government—whether a Cabinet member or a bureau chief or one of their assistants or advisers—has a vital interest in making a positive record for himself. He does not take it for granted that he will be in the federal service forever; he probably keeps a close acquaintance with private organizations and his specialized field of interest, whether it is agriculture or banking or law, and his reputation among his colleagues in the field—in both public and private positions—depends on what they think of his ability to get a job done. That ability will depend partly on his leadership in his professional organization, among the leaders of the trade association concerned, or with the general public.

It is not at all unusual for career civil servants, or public officials temporarily in the service, to help build up support for policies. For example, soil-conservation officials in the United States, whether employed by federal, state, or local governments, whether Democrats or Republicans, will unite in advocating their programs among the people and before Congress under the leadership of the specialists in the Department of Agriculture, headed by the chief specialist, the Secretary of the Department. It is significant that Great Britain, which has far more effective organizations of public officials for the protection of their own interests than does the United States, has far less effective organizations of officials devoted to the improvement of their service to the public.

There is not much doubt that American public officials lack the political inhibitions of the British civil servants. But one of the most persistent ideas that Americans in general have picked up from the parliamentary system is that there is something improper about this kind of positive attitude of the public official toward his job. Frequently an executive official is criticized for proposing or advocating a policy on the grounds that he is thereby infringing the prerogatives of Congress or violating some essential principle of democratic government. Civil servants under a parliamentary system of democracy remain anonymous and deferential to the legislature as a matter of principle; it is almost essential for them to have permanent tenure of office, and a set of permanent officials at the top of the adminis-

trative hierarchy would seriously unbalance the democratic process if it took a leading role in the public discussion of policies. They have to be neutral for the same reason that the British King has to be neutral; he too is in a position where he could make democratic control of policy impossible, and he too has retained his permanent position in a democracy as a result of a tacit bargain to stay out of policy and politics.

But under the presidential system the public official is under no such restraint. The popular control of the executive is a double control: the people elect the President and the President holds his appointees responsible, retaining the power to discharge them at his discretion; and the people elect the Congress, which controls the executive by statutes, by appropriations, and by investigations. For failing to comply with congressional legislation, a public official is subject to legal penalties; for being so zealously opposed to administration policy that his administrative usefulness is ended, he is subject to removal by his administrative superiors. But since the advocacy of policy by the administrative official does not threaten the tenure of Congressmen, it does not need to be prohibited. Unlike the House of Commons, the Congress retains the power to regulate and control the executive in detail, without putting at stake on any issue the tenure of office of its own members or the President or (generally speaking) subordinate executives. For this reason, it largely divorces questions of policy from questions of party politics in its own proceedings, and executive officials are therefore free to participate in discussions of policy as much as they like—if they are willing to risk their jobs by making themselves no longer useful to the President or his successor. In public discussions of policy they are no more bound as a matter of democratic principle by the restrictions that apply to the British civil service than the President is bound by the restrictions that apply to the King—and for exactly the same reason.

Democratic control over a public official is most effective if it is backed up by the sanction of dismissal and if that sanction is a practical, not merely a theoretical, weapon. In the Middle Ages the English barons, when mortally offended at some act of the King's, felt obliged to protest their loyalty to his person, to blame his acts on bad advice, and to punish the advisers. History does not lead us to believe that this system had much effect on the character of kings as long as kings had real power. The parliamentary system operates on the same theory with respect to the civil service; you must not fire leading civil servants, for the minister is "responsible" if they are wrong. And the political ascendancy of the Cabinet over the House of Commons has made it nearly impossible to fire the minister on the mere judgment of the members of the House—it takes a considerable revulsion of popular feeling.

In enforcing the responsibility of public officials, the parliamentary system has another practical disadvantage in addition to the difficulty of dismissal. That disadvantage, like several others, springs from the Cabinet's inevitable jealousy of any rivals within the legislature: it is that the minister must be the sole channel of communication between the House and the department. What the minister cannot tell Parliament or the country, after proper coaching, about the policies of the department must remain untold. Sir Austen Chamberlain pointed out to the 1931 Select Committee that a specialized parliamentary committee would have difficulty in learning the details of government policy, since naturally no minister could permit his civil servants to testify before a committee on any question in which policy was involved. The "question hour" lets the members of the House of Commons put the minister on the spot, but the questioning is emasculated by a procedural etiquette which no committee of Congress would tolerate for a moment. The parliamentary system draws clear lines between the House and the Cabinet, between the minister and the administrator, between

the administrator and the technician, and these lines are barriers to the transmission of information and the operation of democratic control over the details of policy.

The presidential system, although it unifies responsibility for the execution of a program, does not unify responsibility for the preparation and enactment of a legislative program, as does the parliamentary system. Thus the voters are less able to hold a party clearly responsible for its administration of the program as a whole. On the other hand, the voters have a double check on their government—administratively through the President, their only national representative, and legislatively through the Congress. And they know that, however poorly the President and the Congress are carrying out their responsibilities, they are not kept from exercising their controls by a system of mutual deference that results from the fear of disturbing each other's tenure of office.

Constitutional Federalism

It is easy to arrange complete harmony between executive and legislature by unifying them. But that only covers up the problem; any differences then appear within the legislature itself, and if they are serious enough the several factions, merely by refusing to cooperate, can simply bring government to a standstill. There is nothing automatic in the process by which various political groups combine in a two-party system. That process has to be impelled by a positive community of interest and a positive loyalty to a central symbol. If even a significant minority has different interests and no loyalty and wishes only to make the existing system of government impossible, there can be no orderly opposition, no gentlemanly alternation of "ins" and "outs."

During the nineteenth century there was little friction in the British parliamentary system because it reflected accurately the concentration of political influence. The two previous centuries had been different. In the seventeenth, England had the first modern revolution, by which an alliance of merchants and religious dissenters abolished the monarchy and experimented with written constitutions, legislative committees, and a republican chief executive—three political developments that died in their native soil but were transplanted to America with great success. Even in the eighteenth century it was still the theory that the British constitution provided a balance of power between the King, who headed the government, the Lords, who represented the great landowners, and the Commons, the lesser landowners and mercantile interests. There are even respectable historians who argue that it was in theory a federal system, in which the King was legally supposed to govern such areas as Ireland, the Channel Islands, and the American colonies through their own assemblies, the Houses at Westminster having no jurisdiction over them. Over these differences of interest many battles royal were fought among the executive and the two Houses of Parliament.

But by the early nineteenth century it was clear as a matter of practical politics that the union of the English landed and mercantile gentry was predominant over all other interests in England, in the United Kingdom, and in the Empire as a whole, and that areas like Ireland and the colonies would have to admit their subordination. The constitutional theory that followed this fact was that Parliament was omnipotent and unrestricted, and that in Parliament supremacy was held by the House of Commons, the most exclusive gentlemen's club in Europe. If there were to be no separation of powers, one house of the legislature had to yield to the other.

Since the House of Commons assumed full control, the government could be directed only by a committee of members who could lead the House from inside. As legislative leaders, the one thing they could not do was to admit any restrictions on the constitutional power of the House. Throughout the Empire its power had to be absolute as long as it existed at all. At the same time, mem-

bers were not in a position to urge local points of view effectively unless they were willing to back them up by a threat not to support the government.

The tendency of this system was consequently toward a uniform national program in essential matters of policy. The uniformity of the program reflected the tight unity of the parliamentary system and the tight unity of the governing class which supported that system—a class produced by a national system of education which taught the gentry to think and talk alike throughout England.

The advantages of such a system were obvious; it prevented such parochialism as the pork-barrel appropriations of the American Congress. On the other hand, it had the disadvantage of providing no formula by which the national government could authoritatively handle national interests, while subordinate areas could deal with their own problems. The Dominions were too distant, perhaps, to be represented in a central legislature, but Ireland was not; and if the theories of royal divine right and then of parliamentary omnipotence had not existed, who knows but that Ireland might have been given control over her own local affairs throughout the nineteenth century and come into the twentieth without her inheritance of hatred against all things English?

A more serious difference between regions more evenly matched in power occurred in the United States without effecting a permanent separation. In the United States, however, an independent executive surmounted the confusion in Congress and held the Union together. He did not have to say, with Dogberry, "Bid any man stand, in the prince's name," and, if he will not stand, "Why, then, take no note of him, but let him go; and presently call the rest of the watch together, and thank God you are rid of a knave." And, significantly enough, the only flagrant sectional oppression in the history of the United States came with the congressional usurpation of executive power during Reconstruction.

A federal constitutional republic needs a separation of powers to keep its federalism adjusted to the wishes of the people. If a single national representative body is omnipotent, it is likely to disregard subordinate loyalties in carrying out its program. Much of the friction that arises between the President and Congress grows out of the conflict between the national program as planned by the executive branch and the impulse of the legislators who modify it in the interests of their constituencies. Since the American executive is not a part of Congress, members of Congress have no institutional incentive to nationalize our system and to ignore the rights and interests of state and local governments. Their lack of individual responsibility for the administration of any federal program enables them to protect local interests and often to overemphasize them.

Senators and Representatives alike may be called to account more effectively by state and local interests than by their national party organizations. The existence of equal representation in the Senate, which the Constitution provides shall be permanent except by the consent of the states, would make it almost impossible to adopt a parliamentary system; it is difficult to imagine the more powerful of the two houses giving control over the executive to the lower house alone, and it is equally fantastic to imagine them acting jointly on every question.

Neither house of Congress has yet been willing to handle legislation by a committee system which is immediately responsible to the wishes of the house as a whole. If the isolationist Senator Reynolds heads the Military Affairs Committee during a world war, the Senate simply puts up with him. The advocates of "responsible" government will know they are making progress when either house decides to remove the chairman of any committee that differs with the house as a whole on a question of policy. And when both houses agree to hold each other's committees mutually responsible, and to discharge their chairmen whenever they disagree with each other, then we shall

really be well along toward minimizing local differences and adopting the tightly knit system of parliamentary government.

But in the meantime, the flexibility of the presidential system has its advantages. We can make progress piecemeal, without waiting for a whole program to get approval in principle. The chief executive can get a majority from these groups on one issue, from those groups on another. The party discipline can be relatively loose; groups that oppose the administration on one issue for local or special reasons need not oppose it on the next. A parliamentary cabinet, by tending to command the same majority on all issues (since that majority wants to keep its administration in office) also tends to keep the opposition always against it. If that minority is concentrated in national or regional or social groups that appeal strongly enough to the loyalty of their members, such opposition is apt to become uncompromising and irreconcilable.

The kind of flexibility that the presidential system permits may be useful in dealing with various types of institutions, as well as with various regions or political groups in the state.

The neat logic of the parliamentary system requires the legislature to hold the executive responsible for a little issue in the same way as for a big one, for a technical detail or a subordinate's error in judgment in the same way as for a major policy decision. This was tolerable enough when government had very little to do with the daily lives of people. But now the dividing line between governmental and other institutions has become very shadowy, all sorts of hybrid agencies and corporations exist, and many private corporations and institutions carry on functions for governmental agencies. In such a situation, if a legislature is to keep the whole organism working in the public interest, it cannot depend mainly on a power to hire and fire the head of it, but it must approve one action and condemn another, encourage here and reprove there, expand this agency and restrict that one.

Under the parliamentary system the legislature must always hold a sword over the head of the executive and cannot stoop to slap his hand. To keep a discussion of the British Broadcasting Corporation from bringing up a vote along party lines on which the Cabinet might be ousted, the Cabinet had to set it up by a statute that makes it generally impossible for the House to control its detailed operations or even to ask questions about them. If an executive and a legislature have a degree of mutual independence, the legislature may review the budget of a government corporation and force it to change its policy without conflicting with the chief executive at all.

In their system of legislative control over the executive the British have let the Americans outdo them in refusing to conform to an abstract theory. The omnipotence of the House of Commons, the absolute responsibility of the ministers to Parliament—these ideas are so mystical that they can be explained only in terms of nostalgia for the nineteenth century. They are corollaries to other absolutes of the nineteenth century that we now see melting away—the idea of the absolute sovereignty of each nation, the idea of the complete freedom of private business from governmental interference. In the years that lie ahead, we shall probably work out a great many compromise adjustments between the world program and the interests of nations and their component parts; between governmental policy and the freedom of private corporations and institutions. If a legislative body is going to play an active role in such developments, it will need to be able to make up its collective mind coherently and responsibly, as the parliamentary system has been supposed to require it to do. But it will also need freedom to be inconsistent, to restrain the executive even when it wishes to support him, and to keep people and institutions from being fitted to the Procrustean bed of unified policy. Every step toward unification with the executive is a step toward the loss of that freedom.

The Sanctification of a Subterfuge

WHAT Bagehot wrote about the parliamentary system was not a constitutional dogma, but a description of how an informal political arrangement really operated in 1867. Legally and theoretically, the government of Great Britain was Her Majesty's Government; the ministers kissed Her Majesty's hand on taking office and were dismissed by her when they resigned; the House still voted supplies to the Crown and debated the Queen's address when Parliament came into session. But Bagehot explained that these "theatrical elements" of the monarchy only appealed to the "ruder sort" of subjects, while the effective part of the system—the responsibility of the Cabinet to the House of Commons—made the government work.

The parliamentary system was originally a sort of refined blackmail by which log-rolling groups in the House of Commons conspired to take control of the executive branch away from the Crown by threatening to refuse supplies if their demands were not met. This process was considered somewhat indecent in the eighteenth century; ministers like the first Pitt were still servile to the King in person and deplored the existence of parties. But when the idea of popular representative government developed, the blackmailers found they had a respectable case; nineteenth-century English liberals gave up the republican idea of abolishing royalty (which was making considerable headway in the early nineteenth century) for the compromise expedient of nullifying royal influence by the parliamentary system. Bagehot considered the British system only " 'a disguised republic' . . . suited to such a being as the Englishman in such a century as the nineteenth," but Bagehot's rationalization led students to consider this makeshift system the classic form of representative government.

Bagehot himself, of course, looked on it as a sort of temporary compromise with democracy, not as an institution to venerate for all time. Only five years after he published *The English Constitution* he wrote an introduction to its second edition explaining that the system as he described it was already ceasing to exist.

For in 1867, the year in which *The English Constitution* was published, Disraeli's reform bill lowered the property qualification for the franchise, and Great Britain began to be a democracy. But Bagehot pointed out that parliamentary government (or, as he preferred to call it, Cabinet government) would simply be impossible under a system of universal franchise; it is, he said, "only possible in what I may venture to call *deferential* nations . . . in which the numerous unwiser part wishes to be ruled by the less numerous wiser part. . . . A country of respectful poor," he observed, "though far less happy than where there are no poor to be respectful, is nevertheless far more fitted for the best government." As the franchise was repeatedly extended, the British poor became somewhat less like the "miserable creatures . . . politically contented as well as politically deferential," on whom Bagehot built his theory. Just as Bagehot feared, their demand that the government improve their economic welfare led both political parties to "bid for the support of the working-man" and even brought about "a political combination of the lower classes." Thus the end of laissez faire and the end of Bagehot's parliamentary system were parts of the same process.

In one other respect Bagehot deserves credit for understanding better than his followers the limitations of the parliamentary system. He made it clear that the system worked best in a restricted area with uniform standards of wealth and education; New England alone could make a parliamentary system work even better than England itself, he said, but the United States as a whole could not make it work at all.

Bagehot understood clearly that the parliamentary system was the result of the British people's failure to take the clean-cut step of assuming direct control of the execu-

tive. Cabinet government, he said, is possible only where the people believe that the executive is not their own agent, and not to be trusted. "We are not in this respect," he said, "'*un vrai peuple moderne*,' like the Americans," who "conceive of their executive as one of their appointed agents. . . . The French, the Swiss, and all nations who breathe the full atmosphere of the nineteenth century, think so too." But the English, he pointed out, can get a strong executive only by the subterfuge of Cabinet government, since by "the very nature of our Government our executive cannot be liked and trusted as the Swiss or the American is liked and trusted."

This statement no longer rings true. The British have obviously liked and trusted their government, they have brought it under popular control with a system of universal franchise, and they have called on it to administer a wide range of social services that America is just beginning to copy. (Sir William Beveridge has even predicted to America that she will fail to establish an adequate system of social security after the war because "we aren't so afraid of government as you are.") As all this has happened, however, a subtle transformation has taken place. It is as subtle as the earlier transformation by which His Majesty's Government effectively became parliamentary or Cabinet government. Bagehot described the earlier change and gave the new system a new name. The parliamentary system, the effective system of Bagehot's day, has now become one of the "theatrical elements" of the British constitution, like the monarchy itself. W. Ivor Jennings has described the new system by which parties, newspapers, trade unions, and associations of many types collaborate to determine the course of public policy. He has described this system of popular government as thoroughly as Bagehot described the parliamentary or Cabinet system. But he lacked Bagehot's willingness to give a new name to a new thing; he called his two most important books *Parliament* and *Cabinet Government*.

Some of the official observers who testified before the Select Committee on Procedure on Public Business in 1931 were less cautious in their comments on what had happened to the parliamentary system. They testified in 1931, in the last few months before Mr. Ramsay MacDonald disbanded Great Britain's last party government and founded an allegedly temporary National Government to deal with the economic emergency. The creation of the Committee gave the more independent statesmen of all shades of political opinion (Mr. Winston Churchill among them) a chance to propose to imitate the American system of legislative committees and to express their opinion that the parliamentary system made it impossible in practice for the House to hold the ministers responsible for their actions.

Let us recall for a moment their testimony. (We probably overlooked it at the time, for we were too preoccupied with the fate of economic institutions to notice our political ones; the London *Times* reported none of the testimony, and American scholarly journals took no notice whatever of the Select Committee's existence.) All those who appeared before the Committee agreed that representative institutions were on trial throughout the world and that the House of Commons had lost a great deal of prestige and authority. Here, however, the agreement ended. Three main types of testimony were given.

One witness, speaking on behalf of the party he headed, proposed to carry the parliamentary system to its logical conclusion: he proposed to create a small emergency cabinet, like the War Cabinet of the first World War, and to give it extensive power to act by executive orders, rather than by legislation. As long as Parliament has "the power to dismiss the Government of the day by vote of censure," he insisted, "it is absurd to speak of Dictatorship." The War Cabinet of 1943, acting by orders such as he proposed, is now keeping the gentleman in question, Sir Oswald Mosley, in jail, and most of his party leaders with him.

The second type of testimony came from the chiefs of the Labour and Conservative parties, supported by a few traditionalists and by the Comptroller and Auditor General, the principal agent of the House in supervising the legality of public expenditure. Mr. MacDonald, who had in earlier years protested against the extent of the Cabinet's control over the House, now proposed to extend it still further. Mr. Baldwin had no idea to offer; he said that he had "been far too busily occupied in the last ten years in trying to run the machine to have ever attempted the reform of Parliament." He had never, he added, "given any consideration to the academic question of whether you could have a better system."

The chiefs of the Labour and Conservative machines were supported by Lord Eustace Percy, whose view (historically quite a correct one) was that it was not "the business of the House of Commons to 'control' the King's Ministers, if by that is meant to control the detail of their administration or even of their expenditure," and that "many of its present defects probably arise from the recent 'democratic' tendency to convert it into a sovereign parliamentary assembly." The noble lord's closing prescription for reform was that "if we could go back to the middle of the Nineteenth Century it would be immensely better."

On the other hand, both the machine and the traditional views were opposed vigorously by independents of all parties. All the leading Liberals, such as Mr. Lloyd George, Sir Herbert Samuel, Sir Archibald Sinclair, and Mr. Ramsay Muir; the Independent Labour Party as a whole, led by Mr. F. W. Jowett; and a few dissenting Conservatives, led by Mr. Winston Churchill, proposed ways by which the House of Commons could reassert its control over the executive. All these critics agreed on one point; that the doctrine of ministerial responsibility—the theory that the power of the House to dismiss the ministers provided a system of democratic control over them—in some ways prevented the House of Commons from controlling the administration. They agreed that this doctrine should be relaxed by permitting the House to vote against the Cabinet's wishes without dismissing the Cabinet and having the House itself dissolved, on many questions which the Cabinet had been considering "questions of confidence." They wished to make this change in order to make it possible for the House to set up committees like those of the Congress in the United States. Most of them, furthermore, were in favor of the creation of regional or functional assemblies of one kind or another, so that Parliament could delegate to other bodies certain types of legislation.

In appraising their systems of legislative-executive relations, the British and the Americans are both inclined to make the classic theory of parliamentary government their touchstone. Neither nation can really make it work under twentieth-century conditions, but both are curiously fascinated by it and judge the systems as they actually exist in terms of patterns that are now dead. But the effects of this spell on the two nations are different in one respect. In Great Britain, the innovators are fairly free of it; it is the traditionalists who are eager to go back to the middle of the nineteenth century. The innovators, at least, are in a position to propose something practical, as did Mr. Ramsay Muir in 1931 when he argued for a hierarchy of Cabinet committees much like the one which now exists under the War Cabinet. But in the United States the traditionalists and the innovators, among our academic and journalistic critics, argue for what will amount to the same thing. Our traditionalists want to go back to the American practice of the days of Buchanan and Grant and Harding—a weak executive and government by congressional committees—while our innovators, who always seem to turn to the classic theory of parliamentary government for their arguments, want to go back with Lord Eustace Percy to the House of Commons of the middle of the nineteenth century; but the specific steps that they usually propose could only serve to weaken the ex-

ecutive and lessen the unity of the legislature.

Those who were arguing in 1931 in Great Britain for innovations in the system of legislative-executive relations did not achieve any immediate practical results. When the economic crisis led to the resignation of the MacDonald Labour government and the creation of the National Government in August, 1931, the Select Committee handed in its Minutes of Evidence without any report or recommendations. But the independent critics had at least made some realistic observations about the responsibility of the Cabinet to the House of Commons in relation to twentieth-century conditions inside Great Britain, and asked some searching questions.

The last few years have added to the changes that the Select Committee observed. The collective responsibility of the Cabinet seems a curious myth when we remember that the storm of disapproval over the Hoare-Laval pact led the other appeasers in the Cabinet to drop Sir Samuel Hoare, much as an American President drops a subordinate who is a political liability, and remain comfortably in power. Or that members of the House now insist again and again that Mr. Churchill stay in office himself but discharge certain of his colleagues. Or that the Secretary of State for War can be a former civil servant who was obviously not chosen for parliamentary leadership. The control of the Cabinet by the House of Commons seems equally mythical when we remember that the idea of a "National Government" replaced that of party responsibility in 1931, and that Mr. Neville Chamberlain could be made to resign in 1940 while still commanding an overwhelming majority in the House, being succeeded not by an opposition leader but by Mr. Churchill, who on questions like armaments and empire had been considered more imperialist than the Conservative leaders themselves. And as for the future, Mr. Churchill has predicted the continuance, at least during the period just after the war, of "a national government formally representative of the three parties in the state or . . . a national government comprising the best men in all parties who are willing to serve."

The British have been pretty enterprising since the war began in discarding the dogmas of the parliamentary system. In their peculiar informal way, they seem to be putting into effect something more like the presidential system. At least their political issues now revolve around a single chief executive, who may rely for support on members of all parties while selecting and dismissing department heads at his discretion and who is more concerned with his following in the country at large than with that in the legislature. These changes have certainly not been planned that way, but at least one British authority has found the American Presidency an institution worthy of emulation. It was not to the House of Commons, but to the Senate and the House of Representatives of the United States in Congress assembled, that Mr. Churchill recently spoke of "the Chief Executive Power which the President derives from his office, and in respect of which I am the accredited representative of the Cabinet and His Majesty's Government."

> The wisdom of the founders of the American Constitution [he went on to say] led them to associate the office of Commander in Chief with that of the Presidency of the United States. In this they followed the precedents which were successful in the case of George Washington. It is remarkable that after more than 150 years this combination of political and military authority has been found necessary not only in the United States, but in the case of Marshal Stalin in Russia, and of Generalissimo Chiang Kai-shek in China. Even I, as majority leader in the House of Commons, in one branch of the Legislature, have been drawn from time to time—not perhaps wholly against my will—into some participation in military affairs. Modern war is total, and it is necessary for its conduct that the technical and professional authorities should be sustained and if necessary directed by the heads of governments who have knowledge which enables them to comprehend not only the military but the political and economic affairs at work, and who have the power to focus them all upon the goal.

There was never a more striking contrast between Prime Ministers than is shown by a comparison of this statement with Mr. Baldwin's remark that he had been so busy making a nineteenth-century set of institutions work that he had never considered the "academic question" whether it could be improved. And there has rarely been a more timely tribute to the wisdom of those Americans of the eighteenth century who deliberately rejected both hereditary monarchy and the election of an executive by a legislative assembly, but created instead a new thing—the presidential form of government.

It is odd enough to find Americans who seek to increase legislative control over the executive arguing for the system that in Britain has given the executive control over the legislature, or Americans who seek to remove unpopular department heads arguing for a system that in Britain keeps the administrative heads from being known, much less responsible, to the people. But it is even more peculiar, at a time when people are thinking about the creation of international federal institutions, to find Americans proposing to discard the presidential system that has been associated with constitutional federalism, in favor of a system that has never proved its ability to accommodate the interests of diverse areas and populations in a federal republic.

America is a federation that is becoming a nation; the institutional system that has helped her do so will be of interest to the whole world as it moves toward greater unity. She gets her job of government done by popular control over two cooperating branches—an executive that provides unity and enterprise, a legislature that furnishes independent supervision and the restraining influence of local interests. Members of her public service are as varied in their origins and experience as the mixture of public and private institutions in her society itself; the leading members of that service come from private life and return to it freely, looking on the government as the people's agency open to their participation.

The assumptions that the legislature alone represents the people and that the administrative officials and departments are responsible to the people only through the legislature served the cause of democratic government well when the executive departments were under a hereditary monarch. They are the classical assumptions of the parliamentary system. Under the presidential system they can only set up an impossible relationship as the ideal to be attained and handicap the legislative and executive branches alike in their efforts to work together to meet the demands of a new age.

Supervision of County Debts in Kentucky

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WAR expenditures and the increased complexity of federal-state-local fiscal relations envisaged for the period of postwar readjustment are pointing up the importance of local units as fiscal factors in the national economy. The role of the counties in the total fiscal structure is not insignificant. If the national economy is not to weaken under the stress of financial difficulties, both during and after cessation of hostilities, county finances must be ordered and strengthened. The significance of county debts in relation to the ability of local government to carry on its own responsibilities and those imposed on it by "cooperative" federal-state-local programs cannot be overlooked because of the seeming unimportance of the individual counties.

Freedom of action on the part of local units is rigorously circumscribed by constitutional restrictions, statutory regulations, and political intolerance toward local initiative. Unfortunately, little if anything can be done immediately toward removing these impediments; but a growing interest in intergovernmental fiscal relationships may result in a belated realization on the part of the states that financial management by the counties, which function as administrative arms of the state, can no longer be ignored with impunity and that something more than statutory direction is necessary to insure the proper functioning of local government.

The principal immediate county finance difficulties in Kentucky, except for tax-rate and debt limitations, are legal and administrative in character. It is with respect to these phases of the problem that most progress has been made toward strengthening local finance; and continued progress along these lines affords, perhaps, the only means available by which local finance may be reconditioned in time to contribute to postwar reconstruction. This approach also promises to be the most feasible method of laying the foundation for a permanent local finance structure.

The problem of county finance administration is being attacked upon a broad front: state efforts are being directed toward removing the root causes of county difficulties as well as toward assisting in the solution of current problems. In 1914 the General Assembly provided for a uniform system of accounting for Kentucky counties, and in 1926 it enacted a uniform county budget law. Neither action was successful, but the experience gained from these abortive efforts was valuable in the formulation of the Uniform County Budget and Accounting Act of 1934, the first effective legislation on the subject. The success of this legislation was due largely to care in drafting it and to vigorous administration. Each subsequent session of the legislature has provided for increased supervision by the state over local finance. The most important step in this direction was taken during the state reorganization of 1936, when all state supervision, except the postauditing function and supervision of school finances, was placed in the Department of Revenue. Coordination of state supervision over county debt, taxation, accounting, and budget administration under one responsible head has resulted in more efficient and more effective administration.

The postauditing function is placed in the State Auditor's office, an agency directly

responsible to the people. This arrangement provides an independent check upon administrative activities at both the state and the local levels. State audits of county financial management have been made since 1935. These examinations have usually been made annually; but, owing to an inadequate field staff, they have sometimes been made biennially. About the only objections of local officials to state audits are that they are not made in sufficient detail and that they have not always been made annually. Local officials have learned to appreciate the constructive criticism of state examiners; and the work of these investigators has gone a long way toward bolstering supervisory efforts of the state local finance officer relative to all phases of county financial management.

Effective supervision of county debt administration necessarily involves a substantial measure of state assistance in all phases of county financial management. Otherwise, improvements wrought through reorganizing debt structures would be ultimately defeated. State efforts in Kentucky have been directed toward a solution of the whole finance problem. This discussion, however, is limited to an analysis of the county debt problem in an attempt to analyze and evaluate administrative and supervisory efforts of the state since enactment of the County Debt Act in 1938. This emphasis is not to suggest that other aspects of local finance can be neglected.

The County Debt Problem and Developments Leading to State Supervision

THE county debt problem in Kentucky, except possibly in a few isolated instances, is not so much a matter of excessive indebtedness or lack of economic resources as of constitutionally restricted means of payment, legal difficulties, and administrative shortcomings. As may be observed from Table 1, the aggregate Kentucky county debt in proportion to available resources is relatively small, the $23,000,000 net debt being about $8 per capita and approximately 1.3 per cent of assessed valuation subject to full local rates. If only the indebted counties are considered, the net debt is nearly $13 per capita and 2.6 per cent of assessed valuation.

If Kentucky counties were free to exploit conventional local revenue sources to the fullest extent economically possible or even to the extent reasonably desirable, almost without exception they could render the meager governmental services now being performed and, at the same time, could support a much heavier debt load. Owing, however, to stringent constitutional tax-rate and debt limitations, to an extraordinary property-tax classification scheme, and to a partial separation of state and local revenue sources, most counties are effectually prevented from deriving full benefits from potential sources of income. But even within these limitations, much progress may be made, and it is the purpose of this paper to describe the efforts in this direction.

Development of County Debt Administration. County debt administration in Kentucky may be divided into three distinct periods: first, a preconstitutional period of no state supervision; second, a period of attempted state control through constitutional and statutory limitations; and, finally, since enactment of the County Debt Act in 1938, a period of active state supervision and administrative assistance.

Prior to 1890 there was no state control over local debt administration. Many local units, especially during the railroad-building era, became heavily indebted through attempts to encourage construction of railroads, turnpikes, and other public service enterprises. The constitutional convention of 1890 gave early consideration to the problem and provided rather stringent tax-rate and debt limitations on political subdivisions of the state. With one exception, the "good roads amendment," these have never been altered and have become progressively more restrictive with increasing demands upon local units for enlarged governmental services.

TABLE 1. KENTUCKY COUNTY DEBTS (SEPTEMBER, 1942)[a]

Character of Debt	Net Debt	Net Debt Ratio	
		Per Capita	Per $100 of Assessed Valuation [b]
Voted road and bridge bonds payable from special 20-cent levy.	$15,227,800	$5.35	$0.86
Other bonded debt payable from general 50-cent levy.....	6,653,800	2.34	0.37
Total bonded debt..	21,881,600	7.69	1.23
Floating debts.....	1,157,200	0.41	0.06
Total debt	23,038,800	8.10	1.29

[a] Adapted from data supplied by the state local finance officer.
[b] Includes only assessed values subject to full local tax rates.
[c] Floating debt data consist only of outstanding warrants. Data are not obtainable as to such items as claims payable and purchase commitments, which perhaps will approximate the amounts here shown.

Original provisions of the Constitution, as adopted in 1890, prohibit any county, except for school purposes, from levying taxes in excess of 50 cents per $100 assessed valuation and, without a two-thirds majority vote, from incurring during any one year indebtedness in excess of the income and revenues provided for the year. With a two-thirds majority vote counties are permitted to create debts up to 2 per cent of assessed valuations. An exception is made for emergencies, but the Kentucky courts have never recognized the existence of an emergency in any county by which the creation of bonded indebtedness in excess of the 2 per cent limitation may be justified. The Constitution further restricts county action by providing that whenever indebtedness is incurred provision must be made for the creation and maintenance of a sinking fund and for levying taxes sufficient to pay the principal and interest in not more than forty years.

With the advent of the automobile as a common means of travel throughout the state people demanded improved highway facilities; but counties in most sections of the state were unable to meet the demand because of constitutional limitations upon their taxing and borrowing powers. As a corrective measure, the Constitution was amended in 1909 to permit counties, subject to a majority vote, to incur additional indebtedness for road and bridge purposes up to 5 per cent of the value of all property subject to local taxation and to levy a special 20-cent tax in addition to the regular 50-cent levy for general purposes.

Recently, many counties in the construction of schools, courthouses, and hospitals have resorted to a complicated and ingenious device, commonly known as the "holding company plan," in order either to avoid constitutional debt limitations or to escape rigorous statutory regulations. The scheme is a mere subterfuge to elude legal difficulties, but the courts have repeatedly upheld its validity on the ground that these obligations do not constitute county liabilities. Similarly, because such bonds technically are obligations of the corporate entity and not of the county, they do not come under state supervision.[1]

Factors Responsible for the Incurrence of Debt. Incurrence of indebtedness by Kentucky counties may be attributed primarily to the following factors: (*a*) Tax resources inadequate to maintain local government properly; (*b*) attempts by the counties to expand their road construction programs when the automobile first came into extensive use and, in particular, the encouragement given them by the state in its highway grants-in-aid program; (*c*) court defeat of tax-rate and debt limitations; and (*d*) improvident administration, and occasionally flagrant mismanagement, of county fiscal affairs. The first of these factors requires no comment. The others will be discussed in order to afford a basis for the proper understanding of later developments.

The tardiness of the state in assuming its proportionate share of the highway burden was largely responsible for existing road-and-bridge-bond indebtedness, which constitutes approximately 70 per cent of total county obligations. Beginning in 1914, five years after enactment of the "good roads

[1] For a discussion of the holding company device, see John C. Lovett, " 'Lease and Option' Device for Avoiding Constitutional Limitations on the Indebtedness of School Districts in Kentucky," 29 *Kentucky Law Journal* 195 ff (1941).

amendment," the state legislature encouraged counties to take advantage of the enlarged opportunities afforded by the amendment by proposing to reimburse from state sources one-half of any funds raised locally and expended in the construction of a primary system of inter-county-seat highways, the maintenance of which remained a county responsibility. State administrations for a number of years went to extremes in seeking local assistance. In 1920 the state took over the maintenance of these inter-county-seat highways and assumed entire responsibility, except for purchase of rights-of-way and aid given voluntarily by the counties, often under circumstances which amounted to state compulsion, for the construction and maintenance of a primary system of arterial highways throughout the state; but the improvement of access roads remained a county responsibility. Meanwhile, many counties became heavily involved in debt, several to the extent of exceeding constitutional limitations. Most of these obligations were incurred during the 1920's, when the state was encouraging counties to borrow as a means of obtaining state assistance. Historically, road construction had been a county function; and counties scarcely can be blamed for attempting to provide highways adequate to new needs, even though this effort involved heavy debt obligations.

The second largest item of county indebtedness in Kentucky has resulted from funding accumulated annual operating deficits. The constitutional convention intended to force counties to live within their incomes and to create bonded indebtedness only with the assent of a two-thirds majority vote for purposes of meeting extraordinary expenditures and of making capital outlays. This objective was defeated for practical purposes, however, by judicial interpretation of the constitutional prohibitions. As a result of court rulings (outlined in some detail later in the discussion), counties were afforded an opportunity, and many made a practice, of spending all available resources early in the fiscal year and providing for "necessary" expenditures for the remainder of the year through the incurrence of debt. The result was a rapid accumulation of floating debts, some of which have not yet been satisfactorily refinanced.

The Need for State Supervision. The failure of constitutional prohibitions and statutory control measures to prevent the incurrence of excessive indebtedness and to secure competent financial management is clearly evident. In addition to the large amount of floating and funded debt created in contravention of the Constitution, several counties, even after making debt payments over a number of years, and even after improvements brought about by large-scale refundings under the County Debt Act of 1938, still have outstanding obligations in excess of constitutional limitations.

County administrative authority in Kentucky is clumsily allocated, and duties are vaguely defined. Faulty organization, inefficiency, and failure of local officials to accept responsibility have inevitably resulted in errors, and in misapplications of public funds, especially as related to such technical tasks as the administration of sinking funds, the issue and sale of bonds, and funding operations. The combined effect has been to produce difficulties, many of which are formidable. A few counties habitually, and others frequently, have incurred obligations in excess of revenue receipts. Though outright abuse of authority was sometimes evident, the general diffusion of responsibility among county officials, incompetence and lack of sincerity of purpose of county fiscal courts (county governing bodies), and the absence of encumbrance accounting records were primarily responsible for the failure of most counties to observe sound budgetary practices. County officials, in the absence of competent guidance and supervision, often exercised bad financial judgment, as is apparent in the large floating debts that were accumulated as a result of the free-and-easy spending during the 1920's. Similarly, the widespread diversion, improper investment, and dissipation of county sinking funds, al-

though occasionally attributable to flagrant dishonesty, have indicated generally the need for expert technical assistance and financial supervision.[1]

Such considerations, together with the occasional shady practices incident to the creation of county obligations, resulted, prior to enactment of the County Debt Act in 1938, in wholesale resort to the courts for adjudication of debt difficulties. The Court of Appeals recently remarked that "it had almost become a custom for suits to be filed where those attacking the validity of the indebtedness of a county desired the indebtedness upheld, and the attack thereon was a mere sham."

State Supervision Authorized. In addition to the incompetence with which the financial affairs of many counties were being conducted and the steadily growing resort to the courts for the adjustment of difficulties, debt defaults had become sufficiently numerous prior to enactment of the County Debt Act to evoke general concern throughout the state and to require legislative action. Twenty-six counties were in default and many others were threatened with default.[2] Nothing had been done to assist counties in administering debts which had been accumulating for years; and their impaired credit was interfering so seriously with orderly financing that Governor Chandler called the General Assembly into extraordinary session solely to consider the problem. During a vigorous campaign the Governor had promised a complete reorganization of the state government. Following favorable public receipt of the 1936 reorganization of the state government, the chief executive adopted the recommendation of the State Commissioner of Revenue, James W. Martin of the University of Kentucky, who had been called into the administration to effect the reorganization, that the Governor go one step further and seek legislation providing for state supervision of county finance.

Prior to the convening of the special session of the General Assembly, the Department of Revenue made a special study of county finance.[3] The results of the investigation were published and made available for distribution on the day the General Assembly convened. Copies of the study were distributed among the members of the legislature at the same time that the administration's bill, prepared under the direction of the Commissioner of Revenue, was introduced.

The administration hoped to achieve an orderly refinancing of county indebtedness and to provide for effective budgetary and accounting control. In spite of vigorous, organized efforts of certain county officials, basic features of the administration's bill relating to county budgets were retained, state supervision of uniform accounting was strengthened, and original provisions of the bill relating to county debt administration were enacted almost intact as the County Debt Act.

State Supervision Under the County Debt Act

THE County Debt Act of 1938 marks the beginning of state efforts to assist local officials in refinancing existing debts and to provide for orderly management of county sinking funds. It is also designed to prevent the recurrence of excessive indebtedness and to provide for greater current supervision over all phases of county financial management. The legislature hoped to achieve these objectives by providing for state supervision where needed, but without unnecessarily interfering with the freedom of counties in the management of their own affairs.

[1] James W. Martin, "State Supervision of County Finance in Kentucky," 28 *National Municipal Review* 149–55 (1939).

[2] For a discussion of threatened defaults see George Peak and J. E. Reeves, *Kentucky County Debts, June 30, 1938*, Bulletin of the Bureau of Business Research, University of Kentucky, Vol. II, No. 3 (February, 1940).

[3] James W. Martin *et al.*, *County Finance in Kentucky: A Comparative Analysis of the 1937–38 County Budgets*, Special Report No. 2, Kentucky Department of Revenue (Frankfort, 1938).

Basically, the Act provides for cooperative effort by the two levels of government; but partial state control is possible in those extreme instances in which imposition of limitations is necessary as a last resort.

Administrative Organization and Assignment of Authority. State supervision of county debt administration is vested in the county debt commission and the state local finance officer. The commission is composed of the Governor as chairman and seven other state officers as ex-officio members. All serve without compensation. The Commissioner of Revenue, or an agent appointed by him with the approval of the Governor, serves as state local finance officer. This arrangement places supervision of county finance and debt administration, subject to such direction as the county debt commission may prescribe, in the State Revenue Department.

The commission functions generally as a policy-determining body and as an administrative-appeal agency. It is authorized to make rules and regulations for the enforcement of the County Debt Act and to hear and dispose of appeals from decisions of the local finance officer. It is also required to study problems of county finance both in Kentucky and in other states for the purpose of making recommendations to the Legislative Council and to the General Assembly. In the performance of this duty it may require the local finance officer to prepare studies on designated subjects and to publish such studies as it may direct.

Appeals from decisions of the local finance officer may be taken to the commission and for judicial review to the Franklin Circuit Court; but findings of fact by the commission, if supported by substantial evidence, are final. In its fact-finding capacity the commission may conduct public hearings on any question before it for determination; and county officials, taxpayers, or creditors of the county may demand a hearing if they have a material interest in the proceedings. In either instance, the commission may act through a committee or referee.

The local finance officer, in addition to performing duties required of him by the county debt commission, is required by statute (*a*) to approve certain county bond issues, (*b*) to assist counties in formulating plans for reorganizing their debt structures, (*c*) to administer certain county sinking funds, (*d*) to approve county budgets, (*e*) to prescribe and supervise the installation and maintenance of county accounts, and (*f*) to perform various other supervisory functions.

The first major objective of the County Debt Act and the one which has been given most attention by the local finance officer is to provide state assistance to counties in reorganizing their debt structures. Though state assistance in refinancing depends on voluntary assent of the county, the initiative may be taken either by the local finance officer or by the county.

When any county (*a*) is in default on the principal or interest of any funded or unfunded indebtedness, (*b*) gives evidence of becoming unable to meet principal or interest maturities on any funded indebtedness within a reasonable time, or (*c*) has an indebtedness which might, with advantage to the county, be funded or refunded, the state local finance officer may investigate the debt situation and credit standing of such county and negotiate with its officials and creditors for the purpose of formulating a plan for issuing or re-issuing bonds.

A county is entitled as a matter of right, on petition of its fiscal court, to the assistance of the local finance officer. Thus, the facilities of the state are placed at the disposal of counties in reorganizing their debt structures; but counties are free to refuse state assistance, except in case of some original bond issues. If original issues exceed 0.5 per cent of assessed valuation, approval of the state local finance officer is mandatory.

Before the local finance officer may approve any bond issue, whether an original or refunding issue, there must be compliance with certain statutory requirements. He is required to ascertain (*a*) whether the financial conditions and prospects of the county warrant "a reasonable expectation that interest and principal maturities can be met when due without seriously restricting other

expenditures of the county, (*b*) whether the best interests of both the county and its creditors will be served, and (*c*) whether the bonds or their issuance is valid." If dissatisfied with the decision of the local finance officer, any interested party—a category which includes any taxpayer—may appeal to the commission and, on giving bond for costs, appeal from its decision to the Franklin Circuit Court.

In order to guarantee regularity, the statutes prescribe in considerable detail the procedure to be followed in issuing bonds. The local finance officer must conduct public hearings for the purpose of determining whether to approve a bond issue; complete and accurate records must be kept of all proceedings; and the bond sale must be properly advertised for sealed, competitive bids. Counties may, however, subject to approval by the local finance officer, exchange by private agreements with bondholders reissues for outstanding bonds; but the old bonds must be taken in at or below par value.

Refinancing Difficulties. As only one county has floated an original bond issue under the provisions of the County Debt Act and as the major efforts of the local finance officer have been directed toward reorganizing the county debt structure which existed when the Act was passed, any evaluation of Kentucky's experience in supervising county debt administration must be primarily in terms of its success in refinancing operations. For such an evaluation to be intelligible, recognition must be given to the problems existing in the situation when refinancing was undertaken. These problems fall roughly within three categories: (*a*) the character of the indebtedness to be refinanced, (*b*) legal difficulties, and (*c*) administrative difficulties.

The most limiting characteristic of Kentucky county indebtedness in terms of the volume of debts to be refinanced relates to the problem of over-issue. Perhaps nothing typifies more strikingly practical objections to the rigidity of constitutional tax-rate and debt limitations than the sequence of circumstances which have followed their imposition upon Kentucky counties. Most debts were incurred when property values were highly inflated. Some counties incurred the maximum debt permitted by the swollen tax base, and some even exceeded this amount. Subsequently difficulties have arisen as a result of depressed property values, lowered assessments, contracted tax bases, and increased demands for governmental services. The revival of economic activity and the corresponding increase in property values resulting from present war efforts should afford some temporary relief, but counties have experienced a decade of extreme difficulty.

Basically, the financial plight of most counties with current operating difficulties is an outgrowth of the indiscriminate accumulation of floating debts. In some cases the debts have been funded, but in others they are being carried over from year to year in the form of outstanding warrants or claims payable. Although approximately 70 per cent of total county indebtedness is in the form of road and bridge bonds, the floating debt constitutes by far the most serious problem. Payment of principal and interest on road and bridge bonds, except for a few issues which are payable out of general funds, is restricted to the proceeds of the special 20-cent levy; whereas the floating indebtedness must be serviced out of general funds, which frequently are inadequate to liquidate the debt and to provide for the necessary current functions of government. The courts have also held that road-and-bridge-bond payments may be refunded after expiration of the forty-year time limitation, thus permitting deliberate arrangement of maturity schedules with the idea of refinancing a substantial portion of the debt at maturity; but in the case of general funding bonds there is considerable doubt as to whether maturities may be arranged to provide for refunding.

From a refinancing point of view perhaps the most limiting characteristic of county indebtedness, particularly the floating and

funded debt, is its questionable validity. The exact nature of much of the floating debt is indeterminable, owing to inadequate records, to the unbusinesslike manner in which county financial affairs are conducted, and to vicious fiscal court practices. Even the validity of many funding bonds is doubtful because the original floating debts were of questionable character. Inconsistent court interpretations have added confusion.

County debts were incurred largely prior to 1932 when there was no requirement that bond issues be reviewed either by the judiciary or by a state administrative agency. Most, if not all, funding bonds were issued solely on the authority of fiscal court orders; and many voted obligations were issued by fiscal courts with no guidance or legal counsel by disinterested parties. The incompetence of these bodies to deal successfully with technicalities of funding operations and the occasional shady practices incident to the issuance of bonds are evidenced by frequent contradictions between county records and recitals of fact contained in bond resolutions. Owing to the prevalence of such conditions, the local finance officer has remarked that "few funding bonds antedating 1932 will bear close scrutiny." Many were issued in excess of constitutional limitations, and irregularities in performing the conditions precedent to issuance are a usual feature in the history of others.

Aside from the question of validity, other features of county bonds have made refinancing very difficult. During the 1920's, when most bonds were issued, there was no official financial expert in the state to advise with local officials. Technical assistance, if any, was afforded voluntarily by interested financial institutions, and counties were usually influenced to issue the types of bonds that were selling most advantageously. Most issues were of long-term bonds, as these were commanding a premium in the market. For the same reasons, few early bonds contained any provisions respecting negotiability, and interest payments and maturity dates were not arranged to harmonize with county financial convenience. In this connection, the city finance director of Louisville, Kentucky, who has had wide municipal finance experience, has stated: "It is easy to condemn county management for a faulty debt structure, but, after all, the broker and prospective purchaser of bonds are largely to blame for many of the existing situations." Also, " . . . local banks and the Kentucky Bankers' Association are not entirely blameless."

Briefly, the faulty character of county debts generally has made refinancing exceedingly difficult and in some instances virtually impossible. It has resulted in numerous inconveniences, perplexing legal difficulties, and costly delays in the majority of funding and refunding operations which have been undertaken.

Legal Difficulties. By far the most serious problem with which the local finance officer has had to deal, and one that promises to continue vexatious, relates to judicial construction of constitutional debt limitations. Owing to variations and inconsistencies in their pronouncements, court decisions instead of clarifying doubtful issues generally have resulted in additional confusion.[1]

As a result of court rulings, debt limitations since 1902 have been applicable only to voluntary contractual obligations created by so-called "unnecessary governmental expenditures," the "necessary governmental expenditures" being thus effectively excluded from constitutional restraints. Specific expenditures held to be unnecessary include the employment of farm and home demonstration agents, construction and maintenance of roads and bridges, and the erection of courthouses; whereas necessary expenditures include, among others, protection of life and property from mob violence, such fixed liabilities as officials' salaries, election expenses, and expenses of maintaining county hospitals, and expenses inci-

[1] For a more detailed discussion of legal difficulties see Glenn D. Morrow, "County Debt Difficulties in Kentucky," 31 *Kentucky Law Journal* 122–46, 242–67 (January and March, 1943).

dent to the protection of public health and the abatement of nuisances. The obvious lack of a definite line of demarcation between the two types of expenditures has added to the uncertainty of funding, and varying court interpretations as to the fundability of the debts have increased the confusion.

In a 1906 decision, which amounted in effect to legislation by judicial construction, the Court of Appeals ruled that the amount of voluntary indebtedness which a county could incur during any one year was to be ascertained by the *50-cent maximum permissible tax levy and not by the actual levy*, and that 100 per cent collections could be anticipated. The relation the maximum permissible tax levy and the assumption of 100 per cent collections bear to the income realized from the actual levy is not clear. Nevertheless, this obviously absurd ruling of the Court was followed consistently for over thirty years and afforded counties an opportunity to create operating deficits annually. The effects of the decision were ameliorated somewhat in 1917 when the Court defined the extent to which operating deficits could be forwarded to succeeding years by holding that provision must be made in the budget of the following year for payment of the amount forwarded before expenditures could be made for so-called unnecessary governmental purposes. From a practical point of view, however, the constructive effects of this decision were destroyed ten years later when the Court in 1927 authorized counties to fund these accumulated deficits. Within a period of three years approximately four million dollars of floating debts were funded. A dissenting judge later wrote that there resulted "a steady procession of cases to our court, most of them very friendly indeed, asking in effect the validation of refunding bonds issued without the vote of the people." [1] Thomas Graham, leading dealer in municipal bonds, recently stated: "The worst situation in the State, which is County Funding Bonds, was created by the decisions of the Court of Appeals and (it should be emphasized) that this is actually their baby."

One of the few questions to which the courts have given a clear answer relates to the rights of nonassenting bondholders in refinancing operations. This matter is exceedingly important, as virtually all outstanding bond issues are non-callable and refunding is necessarily contingent on the voluntary assent of bondholders to the exchange. If a few bondholders by steadfastly refusing to agree to the terms of any refunding plan could defeat refinancing operations, any effort to relieve the county debt situation would be practically nullified. Fortunately—with an insignificant exception—only one of the hundreds of holders of bonds which have been refinanced under the County Debt Act has been uncooperative. This holder, however, has successfully blocked refunding operations in two counties and in refunding operations in five others the bonds he controls have been permitted to remain outstanding and unrefunded.

A feasible solution to the difficulty, which in essence is the pro-rata distribution of the sinking fund assets between the holders of the refunded and the unrefunded bonds, has been devised and has been sanctioned by the Court of Appeals on the ground that "The principle that equality is equity dictates the approval of the plan which, while deferring payment in full to some, insures, within the limit of human foresight, the ultimate payment in full to all." Different amortization arrangements, however, discriminate between bondholders and may work injustices to some, as the original rights of claimants are necessarily modified. Furthermore, the plan gives rise to administrative difficulties, including complicated bookkeeping. Another possible method of dealing with obstinate bondholders, available as a last resort, is supplied by the Federal Municipal Bankruptcy Act.

Another question which has confused re-

[1] R. P. Dietzman, "Constitutional Limitations on Public Indebtedness," 20 *Kentucky Law Journal* 82 (1931).

funding operations relates to permissible maturities of refunding bonds. The Constitution provides that county bonds must mature within not more than forty years. The legislature forbade the issuance of road and bridge bonds to run for over thirty years. The act was upheld by the courts, and for several years no one questioned the authority of the legislature to impose the additional time limitation. In 1941, the Court of Appeals declared the thirty-year limitation to be unconstitutional.

The legislation and the earlier decisions of the Court delayed refinancing and imposed a condition whereby it was necessary for some counties to seek a reduction in interest rates in order to pay out in thirty years. Counties generally have hesitated to ask bondholders to agree to reduced interest rates; and the local finance officer early adopted the policy of seeking reductions, particularly on voted road and bridge bonds, only if they appeared necessary. Relying on the statute as upheld by the Court, he refused, prior to 1941, to approve any road-and-bridge-bond refunding issues if property values at the time of the proposed reissue would not justify a reasonable expectation that the bonds could be retired within thirty years. In some counties a reduction in the interest rates offered the only solution, but as such action affected adversely the holders of outstanding bonds they resisted the change except to the extent that the financial condition of each county appeared to make it necessary.

The recent decision of the Court declaring the thirty-year limitation unconstitutional tends to prevent refinancing at reduced interest rates and will permit reorganization of the debt structures of a few counties with heavy bond obligations. In those cases, however, in which refinancing on a forty-year basis does not appear to be necessary, the local finance officer is attempting to adhere rather closely to thirty years, using the extra length of time the bonds could run as an additional margin of safety. The 1941 decision also promises to reduce substantially the number of bonds of doubtful validity because of over-issue. Most bonds were issued under the thirty-year limitation, and extension of the time of payment to forty years will permit the retirement of larger issues from limited tax sources. This results from decisions of the Court holding that the special 20-cent road tax limits the authority of counties to incur road-and-bridge-bond obligations to such amounts as may be retired from the proceeds of the special levy.

By far the greatest legal difficulty with which the local finance officer has had to deal in refunding road and bridge bonds arises from inconsistent construction of the "good roads amendment." Apparently, the Court has never known whether to consider these bonds as general obligations in addition to other indebtedness or as restricted obligations payable only out of the special 20-cent levy. The most outstanding illustration of this difficulty is the question as to whether road and bridge bonds are negotiable. Under the Kentucky Uniform Negotiable Instruments Act a bond containing an unconditional promise to pay is a negotiable instrument; but an order or promise to pay out of a particular fund is not unconditional. Soon after enactment of the County Debt Act, the Court held road and bridge bonds to be payable from a restricted fund and, therefore, non-negotiable. In a rehearing, however, the Court reversed this decision and held that the bonds were negotiable on the ground that, although payment was limited to the special 20-cent road tax, the bonds were renewable and payment could be extended over an indefinite period of time. Had the original opinion of the Court been permitted to stand, the County Debt Act would have been practically nullified. As it was, all refinancing was temporarily suspended pending final determination of the issue.

Even though the Court recognized the fallacy of its earlier decision, the deterrent effect has not been completely eliminated, as refundings have been subsequently ham-

pered by prevailing uncertainty. Formerly, federal and state courts and the investing public generally had considered such bonds to be general obligations negotiable in character. The immediate effect of the original decision was to destroy an important feature of the marketability of approximately $20,000,000 of road and bridge bonds. Overnight their asked price dropped around thirty points with no takers. On the other hand, however, the decision indirectly enhanced the value of general fund bonds. Inferentially, the legal obligation of counties to appropriate general funds for the payment of road and bridge bonds was questioned. This issue, however, has never been definitely settled. Investment bankers are unanimous in their contention that the litigation, together with the unfavorable publicity it received, has tended to create an impression on the part of the investing public that Kentucky municipalities generally seek to avoid their debt obligations. Furthermore, the litigation created doubt as to the extent of county liability. Bondholders generally are reluctant to accede to any scaling down of the principal of their bonds, to assent to any reductions in interest rates, or to agree to any refinancing arrangement which tends to affect adversely their interests until they are certain such actions are necessary. Until the extent of county liability and the contractual rights of claimants are definitely clarified, refinancing will be seriously impeded.

Numerous problems relating to the validity of bonds issued prior to 1932, when court validation was first required, have caused the local finance officer considerable difficulty. In refunding operations some question relative to the validity of these old bonds has invariably arisen. Such questions have usually related either to allegations of unconstitutional over-issue or to procedural irregularities. In 1941, the Court of Appeals decreased considerably the number of road-and-bridge-bond issues relative to which the question of over-issue might arise by holding that only the amount of debt in excess of what could be liquidated in forty years (instead of thirty years as theretofore appeared to be required) was invalidly created.

Another question relating to over-issue and to procedural irregularities which has given considerable difficulty pertains to bond recitals providing that constitutional limitations were not exceeded when, as a matter of fact, the amount of the bond issue exceeded such limitations. Several test cases involving the estoppel principle have been before the Court of Appeals, but in each instance the Court declined to pass upon the estoppel issue, basing its decisions on other grounds. In other instances, however, the Court, as a practical matter, has held that the validity of bonds issued prior to the 1932 legislation requiring court validation was to be presumed; that the burden of proof rested on any person trying to show their invalidity; and that, in the absence of such an attack, no burden rested on either the local finance officer or the county to establish the validity of such bonds as a condition precedent to their refunding. Furthermore, the United States district courts of the eastern and the western Kentucky districts have held consistently in a strong line of cases, though always in connection with funding bonds and never in connection with road and bridge bonds, that counties, their officials, and taxpayers will be estopped from denying, in an attempt to plead invalidity as a defense, the truth of statements contained in bond recitals. The local finance officer, on the strength of these decisions, is convinced that most problems relating to the validity of bonds issued prior to 1932 have for all practical purposes been solved, as few counties have any disposition to raise questions of validity when they apply to him for approval of bond issues. In fact, the local finance officer in dealing with one refunding bond issue based his decision on the legal reasoning outlined above.

Several counties have requested, and others doubtless will request, the local finance officer to assist them in the composition of floating indebtedness of a question-

able character. It appears that he will be required to devote much of his attention, at least for a few years, to seeking a solution of these aggravated situations. Although there are many inherent difficulties in separating valid from invalid indebtedness when a county seeks to fund a conglomerate floating debt, recent decisions of the Court of Appeals indicate that the burden of establishing validity rests upon the county and that the decisions are reasonably clear as to the tests to be applied.

Administrative Difficulties. A lack of cooperation among bond houses, brokers, and investors has been responsible for many administrative difficulties. As customers of bond houses other than the one acting as refunding agent ordinarily own substantial portions of the outstanding bonds to be refinanced, the success of refunding operations frequently depends upon favorable recommendations of these nonparticipating institutions. Bond houses, by virtue of their influence with their bondholding clientele, have exerted considerable pressure to obtain a portion of refunding fees. Also, investors who individually or collectively controlled sufficient amounts of bonds to block or to assure the success of refunding operations have demanded exorbitant concessions. In several instances this lack of cooperation necessitated charging large refunding fees and unduly delayed refundings.

At one time the local finance officer considered using the facilities of the Department of Revenue in refunding operations instead of depending upon refunding agents. Fortunately, more harmonious relations have been established, and the local finance officer now enjoys the full cooperation of private interests.

The manner of financing refunding operations has also given considerable difficulty. The Attorney General early advised that expenses incident to refunding could not be deducted from county sinking funds but must be met from general funds of the county or by bondholders. These expenses have averaged about 3 per cent of aggregate refunding issues, and counties sometimes have been unable to meet them from current general fund revenues. Where it has been necessary to assess the expense against bondholders, it has been difficult to get their assent to the exchange. Brokers and bond houses, however, have succeeded in each instance in obtaining the consent of all bondholders. The Department of Revenue has acted as a refunding agent in three instances without involving either the counties or the bondholders in any expense except for printing the bonds and for obtaining legal opinion as to the validity of the issue; but this procedure is impracticable in the majority of cases, as much detailed technical work is involved and the department does not have sufficient staff to perform expeditiously the tasks incident to involved refundings. Apparently, the problem of meeting expenses incident to refunding operations should no longer give any difficulty, however, as the Court of Appeals has recently sanctioned the repayment of expenses from sinking funds in cases in which the refunding operation, through reduction in interest rates or otherwise, resulted in a saving to the county in excess of the amount of the expenses. Also, the 1942 legislature specifically authorized the payment of expenses incident to the issuance of bonds from any premium realized on their sale.

Most counties desire to pay their indebtedness even though there may be some question of legality involved. They believe that they have profited from this indebtedness and are under a moral obligation to honor their bond contracts. But the local finance officer cannot be governed by local sentiment or be influenced by ethical considerations alone; the statutes are explicit in directing that he must withhold approval unless he finds that the refunding is in the best interest of the county and the majority of the creditors. In a few of the most heavily debt-ridden counties, it will probably be necessary to scale down principal, reduce interest rates, or arrange maturity dates so as again to permit refunding that portion of

TABLE 2. BONDS ISSUED UNDER THE COUNTY DEBT ACT [a]

Purpose	Voted Road and Bridge Bonds		Funding Bonds	
	Number of Counties	Amount	Number of Counties	Amount
To correct default	15[b]	$3,623,500[b]	10[c]	$1,186,600
To prevent default	8	1,496,000	3	171,000
To fund floating debt	—	—	4[c]	220,500
To correct default and to fund floating debt	—	—	2	208,500
To refund callable bonds	3	657,500	—	—
Original issue	1	100,000	—	—
Totals	27	5,877,000	18	1,786,000
Less reissues of callable bonds	2	399,500	—	—
Totals (less duplications)	25	5,477,500	18	1,786,000

[a] Adapted from data supplied by the state local finance officer.
[b] One of these issues, amounting to $103,500, is payable from the general fund levy and not from the special 20-cent levy for road and bridge purposes.
[c] One county has two issues, one to correct default and one to fund floating debts.

the indebtedness which cannot be amortized within the forty-year constitutional period.

Perhaps the only solution in a few counties is some sort of compromise arrangement or composition through voluntary bankruptcy. The latter plan was attempted by Perry County—probably for the first time in the United States—in 1940, but its petition of voluntary bankruptcy was dismissed for lack of state enabling legislation. The requisite enabling act was enacted by the 1942 session of the General Assembly and provides that any county, with prior approval of the local finance officer as to the composition plan, may avail itself of the privileges offered by the Federal Municipal Bankruptcy Act.

Progress of Refinancing Operations. Of the twenty-six counties which were in default in 1938 on approximately one million dollars of principal and interest payments, seven were in default on road and bridge bonds, ten on funding bonds, and nine on both types of bonds. Had no preventive or remedial measures since been taken, an additional fourteen counties, or a total of forty, would now be in default on approximately five million dollars of road and bridge bonds, and about twenty-five counties would be in default on over $1,500,000 of funding bonds.

At present only four counties are in default on their voted indebtedness. Refunding plans are under consideration in three of these; in the fourth refunding is hardly worth while, as the indebtedness is so small that it can be liquidated at the present rate of retirement within two or three years. Five counties are still in default on their funding bonds, and a few others may be in arrears temporarily. These five counties simply have funded debt problems which have not been solved.

In addition to the refunding operations indicated by the data presented in Table 2 and several refunding operations which are in varying stages of progress, the local finance officer now has pending before him proceedings for funding the floating debts of four counties and for refunding the funding bonds of one county which is neither confronted nor threatened with default. Also, a proposal recently has been approved for one county to refund a portion of the funding bonds which were issued earlier under the provisions of the County Debt Act. This refinancing operation is being undertaken in order to permit the accumulation of a working surplus in the sinking fund.

Substantial benefits to the counties in interest savings have also resulted from refinancing operations even though the refinanced issues still bear interest rates higher than would be necessary if the bonds were original issues floated currently in the open market. This situation prevails because (*a*) it has been necessary to obtain the voluntary assent of bondholders to refinancing plans, and (*b*) counties and the local finance officer

have not insisted, except in cases where it appeared necessary, on reductions in interest rates.

A number of road and bridge refunding bonds bear interest at the original 5 per cent rate. The lowest rate is 2.5 per cent. On total road-and-bridge refunding obligations aggregating $5,477,500 the average reduction in interest rate is a little more than 1 per cent or, in round figures, an annual saving of about $54,500. This figure does not, however, show the whole picture, as interest-rate reductions will permit more rapid retirement of the principal and thus a compounding of savings. In some cases, however, the savings approximate the mathematical concept of infinity. The 20-cent levy of some counties produced less than enough to meet annual interest charges alone, thus creating a perpetual and annually increasing indebtedness, while, by virtue of reductions in the interest rate, it will be possible for these counties both to pay interest and to retire the principal. On no road-and-bridge-bond refunding has there been any reduction in principal, though in a number of instances defaulted interest accumulations have been settled at less than the full amount.

The interest saving on bonds issued to refund funding bonds and to fund floating indebtedness has approximated 1.5 per cent, an annual saving of about $27,000 on $1,786,600 of bonds issued. There have also been effected in various ways reductions in the face amount of the indebtedness, through waiving defaulted interest in whole or in part and, in some instances of funding obligations, through reducing principal. To cite a few examples: One county discharged an indebtedness of over $200,000 through the issuance of $92,000 of 3 per cent bonds; a second county, an indebtedness of approximately $170,000 through the issuance of $110,000 of 4 per cent bonds; and a third county, an indebtedness of over $200,000 through the issuance of $155,000 of 4 per cent bonds.

The refunded road and bridge bonds generally contain other features which are of as great value as reductions in the interest rate. Almost without exception they are callable prior to their maturity. This feature is in effect a compromise offsetting the disadvantage to counties of the relatively high interest rates borne by some of the refunding bonds. Under many contracts bondholders will receive the higher interest rates to a date corresponding with the maturity dates of the bonds surrendered for exchange, and the counties eventually will be in a position to call and refinance the existing indebtedness at lower interest rates. The call provision has additional advantages. It affords counties an opportunity to refinance outstanding bonds as rapidly as revenue receipts will permit, thus eliminating the necessity of carrying idle money in sinking funds. Similarly, it will facilitate the correction of any possible future difficulties in meeting serial maturities. As a maximum possible safeguard against default, many refunding issues mature in their entirety at the end of a forty-year period, in anticipation that the bonds will be called and retired as rapidly as revenues will permit. Here no interim default can occur so long as annual interest charges can be met.

State Administration of County Sinking Funds. One major objective of the County Debt Act is to provide for improved management of county sinking funds. Any county may, and all counties which have issued bonds with the approval of the local finance officer must, surrender all sinking-fund assets. The local finance officer, in turn, is required within a reasonable time to liquidate all such assets and deposit the proceeds in the county sinking fund. Such deposits must be credited to individual accounts of particular bond issues for which deposits are made. Disbursements must be authorized by the local finance officer and may be made only for payments of principal and interest of bonds for which deposits were made and for investment in specified classes of top-grade securities.

At present the local finance officer is not administering the sinking fund of any

county for which he has not approved a bond issue. A few counties have shown some reluctance to having their bonds approved by the local finance officer because of the requirement relative to state sinking-fund administration. This reluctance, however, has been largely overcome by the insistence of bond houses and investors who consider the sinking-fund provision one of the most important features of state supervision of county debt administration.

Until recently the problem of paying service charges of banks detailed to act as paying agents proved to be a source of considerable irritation. Counties insisted on paying interest coupons through local banks instead of through some centrally located banking institution stipulated in the bond contract. Generally they resented paying a bank for performing this service. The local finance officer insisted that counties comply fully with every detail of the bond contract, but in doing so he experienced considerable difficulty in securing county cooperation. The source from which service charges had to be paid tended to intensify this difficulty. There was no provision in the law for a source of payment other than from county general fund revenues. Because they could not be met out of sinking-fund balances or from the special 20-cent levy, counties were hostile toward their payment. Even though payment was made, the local finance officer was forced to resort to the proverbial tooth-pulling process in order to get the money. The 1942 legislature amended the County Debt Act to provide that the local finance officer may make service payments directly or that, if a bank is retained as paying agent, fees charged for this service may be paid out of Department of Revenue appropriations. The Court of Appeals also ruled during 1942 that service charges could be paid out of sinking-fund balances.

The local finance officer may invest any accrued sinking funds not needed currently in obligations secured by the credit of the United States government, in county road and bridge bonds approved by the county debt commission for such investment, or in other bonds of the particular issue not exceeding the amount of sinking-fund deposits. Certain restrictions, however, are imposed on the purchase of county bonds. The bonds purchased must mature before the sinking funds will be needed. If they are bonds of the particular issue for which the sinking fund is being created, they must be cancelled and the interest cease. County bonds cannot be purchased at a price exceeding market value, or above par value plus accrued interest if they mature within three years, or over 105 plus accrued interest if they mature after three years. All earnings or losses of the consolidated county sinking fund must be prorated among current accounts.

Since June 30, 1941, the number of counties participating in the consolidated county sinking fund administered by the local finance officer has increased from eighteen to thirty-two and the number of sinking fund accounts thus administered has increased from twenty-two to forty-five. Twenty-six are for voted road-and-bridge-bond sinking funds and nineteen are for nonvoted funding bonds. The assets of the consolidated fund increased from $164,000 as of June 30, 1941, to $345,000 on June 30, 1942, and combined receipts and disbursements for the fiscal year ending 1942 amounted to $1,250,000.

As most bonds which have been approved and are being serviced by the local finance officer are serial bonds, sinking-fund receipts are subject to immediate disbursement; and there is never a large sinking-fund balance needed at any one time for interest and maturity payments. Nevertheless, fairly sizable balances have accrued, and approximately $200,000 has been invested in United States defense bonds. Except for the low yield and for the fact that their redemption value appreciates slowly during early years and quite rapidly as they approach maturity, defense bonds are ideally suited for the investment of county sinking fund balances. There is little possi-

bility of loss in case they have to be liquidated to meet disbursements from the sinking fund; but, as there is no assurance that the defense bonds will be held until maturity, the local finance officer is taking no chances and is prorating all value appreciations proportionately among current sinking-fund accounts. This practice promises to work injustices to some counties, as sinking funds of short duration will not benefit by the more rapid value appreciations nearing maturity of the defense bonds.

Financial Reporting. All counties are required periodically to supply the local finance officer with detailed information relative to the state of their finances. Annually, each county must report amounts of each issue of outstanding bonds and unfunded debts, together with interest rates and maturity dates, sinking-fund balances, investments, deposits and earnings, payments of debt principal and interest, and such other information respecting indebtedness as the county debt commission may by regulation require. Also, the county court clerks must submit quarterly reports showing revenue receipts by sources, expenditures, encumbrances, the unencumbered balance of each sinking fund, transfers between funds, and such other information as is prescribed by the local finance officer. Conversely, the local finance officer is required to furnish each county at the close of the fiscal year a detailed report showing the condition of each sinking fund he is administering for the county.

County reports, however, inadequately convey the real status of local finances, owing to the failure of most counties to keep proper accounting records. The local finance officer has been severely handicapped in this respect. Although counties are prohibited by law from borrowing in excess of specified percentages of unrealized and unencumbered balances, if accounting records are not maintained properly debt supervision cannot be fully effective. However, the supervision of county accounting practices is also vested in the local finance officer; and an attempt with varying degrees of success is being made to introduce encumbrance accounting.

Evaluation of Kentucky's Experience

THE immediate objective of the County Debt Act—that of relieving the pressing debt situation which existed at the time of its enactment—is nearly accomplished in relation to road and bridge bonds, and rapid progress is being made toward relieving general funding-bond and floating-debt difficulties. Unquestionably, the most important short-run effect of state supervision has been the reduction in defaults through refunding operations. In addition to direct benefits to counties whose bonds have been refinanced, the removal of the default stigma has materially improved the credit status of Kentucky municipalities generally. This accomplishment may prove to be one of the most important long-run benefits of state supervision.

A close study of the reorganized debt structure of counties whose bonds have been refinanced under state supervision reveals several marked long-run improvements. Owing to the faulty character of most original bond issues, it has been extremely difficult, in some cases virtually impossible, for counties to refinance their indebtedness for purposes either of removing defaults or of taking advantage of favorable interest rates which have prevailed currently in investment markets. As far as possible, refinancing has been done so as to enable counties to liquidate or, if this is not possible, to refinance their indebtedness again should a contingency arise in which doing so would best serve county and creditor interests.

Maturity schedules, interest-payment dates, and various other features of most original bonds were poorly geared to county fiscal convenience. This situation necessitated the accumulation of large sinking-fund reserves which county officials did not administer successfully. The preponderance of serial and callable bonds in the refunding

issues has materially reduced the problem of sinking-fund administration, and counties which have refinanced their indebtedness with state assistance have been relieved entirely of this perplexing problem. Bond houses and investors consider the centralization of county sinking funds under the administration of the local finance officer to be an important aspect of state supervision.

Certain financial, psychological, and political considerations must also enter into the evaluation of state supervision. As these factors tend to be reflected in the bond market, possibly the best measure of the success of state supervision is to be obtained through ascertaining from the leading investment institutions concerned its influence on the credit of Kentucky municipalities.

The consensus of investment bankers is that efforts of the county debt commission and the local finance officer generally have improved the marketability of Kentucky county bonds. Most bankers, however, comment with reservations. Generally there is some doubt as to whether a valid appraisal of improvements can be made, owing to the difficulty of distinguishing between improved credit conditions arising out of administrative action and those resulting from increased assessments and strengthened financial capacity of counties. The investing public generally has tended to associate with state supervision the following actions which it considers beneficial: (*a*) removal of defaults, (*b*) official approval of a state finance officer, (*c*) state administration of county sinking funds, (*d*) interest shown by the state in the local debt situation, (*e*) the servicing of bonds by a state official, and (*f*) the existence of state machinery to assist local officials should difficulties arise.

The most adverse criticism of the local finance officer is directed toward his insistence that all doubtful legal issues be settled by the courts. It is believed that law suits have created an impression with the investing public that Kentucky local governments—cities as well as counties—are attempting to avoid payment of their obligations through taking advantage of technical loopholes in the existing law. The consequent delays and expense, together with the fact that bondholders do not wish to have the validity of their bonds questioned, certainly have delayed refundings. It is possible that certain legal difficulties and attendant expense and confusion could have been avoided had the county debt commission and the local finance officer overlooked technicalities and relied more on the broad general purposes the County Debt Act was designed to accomplish; but it may be that in the long run much confusion has been avoided by the extremely conservative policy which has been followed, as refundings approved by the local finance officer are unquestionably sound from both legal and financial points of view.

Any general conclusions at this stage as to Kentucky's experience with state supervision of county debt administration may prove premature. Although progress may have been slow under the administrative policy which has been followed, it is believed that the broader objectives of the County Debt Act are sound, that a constructive basis is being established for the reorganization of Kentucky county indebtedness, and that satisfactory machinery is in efficient operation for appropriate state control and supervision of county debt administration.

Under present conditions the investing public fails to differentiate between bonds issued under state approval and those which are not. Therefore, full benefits cannot be derived from state supervision even in those counties where it is effective. It is suggested that the scope of the Act should be broadened to embrace all local government indebtedness in order that the whole local situation may be brought under unified state supervision. In many respects cities, towns, and school districts can profit as much as counties from the expert technical assistance and the experienced guidance of a competent state finance specialist.

Although there is still need for substantial improvement in Kentucky, experience indicates that its state-local fiscal relation program generally is basically sound and contains elements which could profitably be incorporated in similar efforts by other states. Numerous county officials who have been active in local government circles for a number of years have remarked that the Uniform County Budget and Accounting Act and the County Debt Act constitute the most important legislation ever enacted by the Kentucky legislature pertaining to county government. The only major objection to state supervision—the fear of centralization and impairment of local autonomy—is rapidly disappearing under the tactful, sympathetic, and common-sense administrative policy followed by the state local finance officer in his dealings with county officials, who are rapidly learning that they have a friend at the state capitol.

Political Ends and Administrative Means

By DAVID M. LEVITAN

War Production Board

I

MORE than half a century has elapsed since Woodrow Wilson published his essay on "The Study of Administration."[1] This marked the first effort, in America, at a systematic delineation of the scope and meaning of the field of administration. The essay was soon followed by Goodnow's *Politics and Administration*, in which the subject matter of administration was again emphasized. Great progress has since been made in the clarification and systematization of the discipline brought to light by these earlier works. In fact, the outstanding development during the twentieth century in the field of public administration has been the evolution of a separate discipline concerned with the execution of public policy, as distinguished from the function of policy determination. The study of administration has become a study of techniques, a study of the "means" as distinguished from the "ends"—a concept aptly summarized in White's statement that "administration is a process."

This identification of administration with techniques, most elaborately developed by Willoughby, has been called the "institutional" approach, perhaps because of its resemblance to the approach of institutional economics. Whatever the origin of the term, the attention focused on administrative techniques, processes, and procedures has contributed much to the improvement of administration in the modern state.

But, valuable as the institutional approach has been for the development of administration, it has also led to the appearance of some dangerous tendencies in modern administrative theory. It is easy to advance from the concept of "administration is a process" to the view that its principles can be scientifically stated, that it can be developed as a separate science, and that, once discovered, administrative principles have universal applicability.

In regarding administration as a separate discipline no one, of course, claims that administration exists in a vacuum; it is generally recognized as a tool for putting into effect policy decisions—for carrying out the purposes of the state. But it is in the tendency to regard it as a tool which, once perfected, can be used for the effectuation of *any* policy decisions, for carrying out *any* purposes, that the danger lies.

Two specific instances may be cited of trends resulting from this view which have highly dangerous potentialities. The first is its effect on administrative personnel, present and future. If sound administrative principles and techniques are equally applicable in any situation, it follows logically that a good administrator need know only these principles and techniques in order to fulfill his functions adequately. And, in fact, the emphasis on administration as concerned only with techniques fosters among some present administrative employees the development of a bureaucratic point of view and a total unconcern with the broader implications of administrative action or, in the case of those with broader training, a deep feeling of resentment as to the lack of importance of their work. Almost every day in Washington one encounters some friend of college or school days who bemoans his

[1] 2 *Political Science Quarterly* 197-222 (1887.)

plight with red tape, his total frustration as a result of his preoccupation with "administrivia." Most of these people have simply failed to see the fundamental nature of their work and its relation to the broader aspects of government and public policy, because it has so often been emphasized to them that their job is to deal with techniques and that broad questions of policy and theory are outside the scope of administration. They no longer search for the more fundamental. They see only a "paper-shuffling" job.

The same emphasis portends some serious shortcomings as to the training of future administrative officials. The tendency is clear. The growth of schools of public administration with their type of program is indicative of the trend with respect to the scope of the training of the administrative official of the future. The emphasis is on courses dealing with "Introduction to Administration," "Principles of Personnel Administration," "Techniques of Classification," "Principles of Budgeting," Principles of Overhead Management," and the like. This type of training, unless founded on a broad theoretical and historical background, will greatly influence the type of students who turn to the study of administration and as a result will greatly influence the type of administration. The administration of the modern service state places a premium upon administrative officials with imagination and insight; yet students with a flair for the broad and endowed with a faculty for assimilating the general will view askance the study of administration. There is a very real concern among many administrators regarding the supply of younger administrators—men with broad vision and understanding. Mr. Paul Appleby, Undersecretary of the Department of Agriculture, emphasized this problem in a paper read before the Washington Chapter of the American Society for Public Administration in the fall of 1942, stressing the importance for higher administrative work of broad training, imagination, and capacity for abstract thinking.

The second unfortunate tendency which has its genesis in the view of administration as a tool which can be used for the effectuation of any policy is the (again logical) extension of this idea to include the belief that administrative machinery can be transplanted from one system of government to another; if it works well in the one, it will work well in the other. Wilson has stated this belief succinctly:

> If I see a murderous fellow sharpening a knife cleverly, I can borrow his way of sharpening the knife without borrowing his probable intention to commit murder with it; and so, if I see a monarchist dyed in the wool managing a public bureau well, I can learn his business methods without changing one of my republican spots.[1]

The dangerous fallacy implicit in this view needs to be clearly understood in order to avoid transplanting into this country from other governments administrative techniques intrinsically incompatible with the underlying philosophy of democratic government.

It should be pointed out that the men who were responsible for the development of the institutional approach themselves realized the importance of the relation between the administration and the broad underlying philosophy of a government. The emphasis on administration as concerned with techniques and means rather than with ends has been so great that sight is often lost of an equally definite aspect of their philosophy of administration. Wilson, after stating the value of a comparative study of techniques of administration, showed that he fully realized the dangers inherent in transmitting systems of administration without regard to the local philosophy:

> By keeping this distinction in view—that is, by studying administration as a means of putting our own politics into convenient practice, as a means of making what is democratically politic towards all administratively possible towards each—we are on perfectly safe ground, and can learn without error what foreign systems have to teach us.[1]

Even more pointed is his admonition that

[1] *Ibid.*, p. 220.

"the principles on which to base a science of administration for America must be principles which have democratic policy very much at heart."

Similarly, Goodnow recognized the close relation between administration and the underlying philosophy of the government. He stated clearly that the nature of the state is as much influenced by the administrative system as by the underlying philosophical principles, that "a system of government" refers to both its principles and its administrative system. "The administrative system has, however, as great influence in giving its tone to the general governmental system as has the form of government set forth in the constitution." [1] And he refers with approval to the view of the German jurist and administrator, Gneist, that "English parliamentary government could not be understood apart from the administrative system."

Other students of the administrative process have also emphasized the closeness of the relationship between administration and political and social philosophy. For example, White, writing in the *Encyclopaedia of the Social Sciences,* says:

> The general character of administration has always been governed by the physical basis of state organization, by the prevailing level of social and cultural organization, by the development of technology, by theories of the function of the state and by more immediate governmental and political traditions and ideals.

There is, therefore, nothing new in the recognition of an organic relationship between the basic principles of a system of government and its administration. In view of the dangerous tendencies already noticed, however, it would seem to be necessary to reemphasize and to clarify this concept. That a need for such reemphasis and clarification exists is made further evident by such statements as that of Schuyler C. Wallace in his *Federal Departmentalization* (pp. 231-33):

> There exists a tendency on the part of many of those who deal with administration to concentrate upon some particular aspect of the general field and to ignore or neglect its relations to the process of government as a whole. . . . Those who deal with administration generally do not look upon the study of that subject as requiring the study of government as a whole—much less as necessitating a broad consideration of the economic, social, and psychological characteristics of the society in which they are operating.

At this time, when many are turning their attention to the solution of the problems related to the establishment of a postwar world order, a genuine understanding of the significance of the administrative and procedural is especially important.

II

ADMINISTRATIVE procedural machinery is much more than a *tool* for the implementation of a political ideology. Administrative procedural machinery is an integral *part* of each political ideology—it is a part of a system of government.

Any system of government is composed of the sum total of its political and philosophical principles and the administrative procedural machinery established for their effectuation. The democratic system of government includes not only such principles as that government is based on the consent of the governed, that the individual is the basis of all legitimate governmental authority, and that the dignity of the individual must be preserved, but also the fundamental administrative procedural machinery to implement these principles. It follows that a system of government cannot be considered as a democratic system, even though its theoretical foundation be the principles included by political theorists in their statement of the democratic dogma, if it is not accompanied by administrative machinery for the realization of the principles.

A striking example is found in the Middle Ages. Recent studies, such as McIlwain's brilliant volume, *Growth of Political Thought in the West,* have done much to clarify our thinking about the political philosophy of the Middle Ages. It had been customary to speak of that era as a period of

[1] *Politics and Administration,* p. 5.

supreme absolutism. Even now one sometimes hears the statement that Hitlerism or fascism marks a return to the philosophy of the Middle Ages. Nothing could be further from the truth. The truth is that the notion of unlimited government—government not subject to a higher law—is foreign to the Middle Ages. The modern doctrine of sovereignty was first enunciated by the apologists for papal authority and church supremacy at the beginning of the fourteenth century. Much of the democratic philosophy was part of the tradition of the Middle Ages, finding expression in the writings of both students and rulers. Yet no one would include the system of government of the Middle Ages in a list of democratic governments, even if the concept include states espousing democratic principles but formally headed by a monarch, as is the case with Great Britain today.

The distinguishing feature between modern democratic government and governments of the past apparently based on democratic principles is the establishment of procedures, of administrative machinery for the effectuation of the basic democratic tenets. The real contribution of modern democracy is not in the development of new principles, or what the lawyer calls "substantive" law, but rather in the development of "procedural" law—the implementation of broad philosophical principles with concrete administrative machinery. The "due process of law" concept, in its true historical sense, is at the very foundation of democratic government.

The fact that in the mind of the average man Hitlerism, barbarism, unfettered government are associated with the idea of the Middle Ages is itself illustrative of this point. Since it is clearly established that no adequate procedural guarantees for checking the authority of the ruler were in existence during the Middle Ages, the system of government has become identified in the popular mind with absolutism; and rightly so. It is a gross error for a student of theory to identify fascism with the philosophy of the Middle Ages, but it is natural for the common man to identify one with the other, for with regard to the things that concern him—his actual rights and liberties—Hitlerism and the governments of the Middle Ages have much in common.

The importance of the administrative and procedural was eloquently summarized by Quincy Wright at the time of the Munich settlement:

> The fundamental legal criticism of the settlement rests on the fact that the statesmen responsible for it placed the substance of the settlement ahead of the procedure by which it was achieved. They thus duplicated the error of the statesmen at Versailles twenty years earlier. . . .
>
> Constitutional government consists in a determination of the citizens of the state that adherence to the procedures set forth in the constitution shall be treated as more important than any specific grievance, demand, or reform. Until the people of the world are similarly determined to place procedures ahead of substance, we may expect the world to alternate between dictates of Versailles and dictates of Munich, with little respite from wars and rumors of wars.[1]

Students of American foreign affairs will need little prodding to realize the role of procedural machinery. The fate of the Versailles Treaty is still too fresh in our minds.

What is true with regard to basic procedures in relation to the basic structure and constitutional framework of the state is equally true with regard to procedures and administrative machinery for the effectuation of the day-by-day decisions and legislation. Social legislation, whether dealing with minimum wages, maximum hours, social security, or labor relations, can have little significance to the citizen; it begets meaning only when supported by detailed "administrivia." A liberal government has value only when based on liberal legislation supported by administrative machinery.

The nature of the administrative procedural machinery is thus seen to be as important as, if not more important than, the nature of the philosophical principles of gov-

[1] "The Munich Settlement and International Law," 33 *American Journal of International Law* 31-32 (1939).

ernment. Democratic government means democracy in administration, as well as in the original legislation. It is of supreme importance that the administrative machinery established for the execution of legislation be permeated with democratic spirit and ideology, with respect for the dignity of man.

Few would gainsay the truth of Wilson's warning: "Liberty cannot live apart from constitutional principle; and no administration, however perfect and liberal its methods, can give men more than a poor counterfeit of liberty if it rest upon illiberal principles of government." But it is apparently not so generally recognized that the converse is likewise true—that no principles of government, however perfect and liberal, can give men more than a poor counterfeit of liberty if they are not implemented by democratic administrative machinery. Administrative authoritarianism, officiousness, and arbitrariness are much more serious threats to the rights and liberties of the individual than arbitrary legislation. The German historian, Niebuhr, summarized this view in his statement that "liberty depends incomparably more upon administration than upon constitutions." Unwise legislation may be mitigated somewhat by considerate and humane administration, but the citizen has no "cushion" against arbitrary officialdom, often hidden behind the cloak of "administrative necessity." The real protection of the citizen lies in the development of a high degree of democratic consciousness among the administrative hierarchy.

Continued emphasis on the universal applicability of administrative principles tends to obfuscate this organic relationship between the political and social theory of the government as a whole and the political and social theory underlying its administration. There is little real basis for a comparative study of the administrative machinery in Nazi Germany and in democratic America. The fact that German administrative machinery is geared to effectuate a philosophy which recognizes no rights of the individual, which denies the very dignity of the human personality—either of the citizen or of the public servant—while the American system is based on the very opposite philosophy makes the German experience of little value, so far as the United States is concerned, not only as to methods and machinery for dealing with the citizen, but even as to internal management. Administrative procedures cannot be transplanted from one system of government to another, but must have their roots in the political and social philosophy underlying their own system of government.

All this is not to deny the existence of any general applicable principles of administration, but to affirm that such principles must be interpreted and applied in a manner consistent with the basic philosophy of the state, and that as so interpreted and applied they exhibit fundamental differences from the same principles applied elsewhere. For example, the concept of "unity of command" has assumed different meanings in Germany and in America. It is one thing to say that in the administration of any program someone must be empowered to make final decisions, after a genuine exchange of ideas up and down the hierarchy. It is a totally different thing to say that in the administration of any program there must be one man to give orders and issue commands. The *Fuehrerschaft* principle denies that all men have the capacity to make some contribution; consequently it is useless to establish channels for the exchange of ideas up and down the hierarchy. In the American system a public servant is not only an employee but also a citizen and, above all, a human being, who retains his basic rights and is therefore entitled to dignity and respect.

The natural human tendency to emulate what others have done is so great, especially if it has appeared successful, that unless the limited aspect of "transplantable administration" is constantly emphasized and the importance of the frame of reference reiter-

ated, much that is contrary to the fundamental spirit of the forum will be transplanted. The danger is especially great where some are interested in changing the spirit of the forum, and the advocated measures carry the blessings of the god of "efficiency." Only maximum vigilance by the administrative hierarchy, based upon a clear understanding and acceptance of the philosophy of the state, will effectively check such efforts.

III

Up to this point, stress has been laid on the prime importance of procedural machinery in effectuating the ends of government and on the necessity for gearing administrative machinery to the basic philosophy of the state. It is also important to realize that, while the existence of such machinery is basic, the machinery itself may be modified from time to time; in fact, must be modified if it is to continue to implement the fundamental principles of the government under changing social and economic conditions.

One of the discouraging symptoms of the myopic condition prevailing among some students of administration is manifested in their failure to see the relation between administrative techniques and social and political environment. On more than one occasion I have heard such students decry the Jacksonian system of administration—the spoils system—without the slightest indication of any realization on their part that the spoils system was based on a very genuine theory of democracy. The technique may be a bad one by our standards; but it was in tune with the social and political philosophy of its day.

Those desiring the *status quo ante* or a return to "normalcy" inevitably rely on old established procedural safeguards, though under the new conditions they are only legal fictions, no longer serving the purposes which they were intended to serve. Students of American constitutional and administrative law will readily recall the "sham" of the due process doctrine. This doctrine, long a bulwark of individual freedom, became under changed conditions an instrument for the miscarriage of justice.

The administrator, whether in a court of law or executive department, must at all times ask himself: "Is the established administrative machinery effectuating the policy—the end which the law sought to accomplish?" Ends broadly and adequately conceived will remain valid for long periods of time, if there are no fundamental changes in the basic philosophy of the government. Such is not the case, however, with regard to the detailed machinery of government. Whereas the ends of a just government have changed little from the days of Plato and Aristotle to our own, the machinery and the specific legal enactments necessary for the realization of these ends have completely changed and will continue to change with the modifications of the physical, technological, social, and economic world about us.

Administrative machinery, then, as an important—perhaps the most important—part of a system of government, must be constantly reexamined in terms of the ends it is intended to serve—in terms of the results which are to be accomplished. Further, the maintenance in this manner of procedural machinery which is in accord with the basic philosophy of the state is, in the long run, more important for the achievement of those ends than is the enactment of substantive law.

This last generalization should, of course, be understood as referring to such broad and intangible ends as liberty of the individual or a just world order. When we are dealing with specific and clearly defined ends, we must not permit ourselves to get so involved in the administrative machinery as to lose sight of the ends; policy decisions will necessarily come before administrative considerations in realizing the ends in view. But even then the importance of the administrative machinery should always be kept in mind; and, in connection with the broader, long-

term ends, it should be recognized as paramount.

IV

AN OUTSTANDING government administrator once remarked that "administration must have a soul." That, in a way, magnificently summarizes the thesis I have been developing. It needs to be added, however, that administration should contribute to the fuller development of the soul of the state. I have tried to point out that the administrative machinery and the political and philosophical principles together determine the system of government; that a democratic state must be not only based on democratic principles but also democratically administered, the democratic philosophy permeating its administrative machinery and being manifested in its relations both with the citizen outside the government and with the citizen inside the government, the public servant; that administrative procedures are even more important in effectuating the basic principles of government than is substantive law; and that these procedures must therefore be constantly reexamined in terms of the ends they serve and changed when the changing social and economic milieu requires different means to attain these ends.

The institutional approach has contributed greatly to the development of administrative theory and practice, but if we so misinterpret it as to regard administration as concerned with "means" and nothing more, we shall be dealing a serious blow not only to administration itself, but to the democratic principles which we are striving to put into effect. The administrators of tomorrow must be men with a clear understanding and acceptance of the philosophy of the state and with the broad vision and imaginative power to gear the administrative machinery to that philosophy.

Reviews of Books and Documents

Organization (Mercator's Projection)

By Charles S. Ascher, National Housing Agency

HOW TO MAKE AND INTERPRET FUNCTIONAL ORGANIZATION CHARTS, by JOHN J. FURIA. Graduate Division for Training in Public Service, New York University, 1943. Pp. 64. $0.50.

IN AN age when the navigator's chief problem was to chart his course correctly by compass, Mercator's projection was clearly the best way of representing the surface of a globe on a flat piece of paper. Any compass bearing appeared as a straight line; it mattered little that Greenland seemed larger than South America, although it was only one-tenth its size. Many of our fathers and many of us after seeing Mercator's map on the schoolroom wall unconsciously came to feel that it was a true—and probably the only possible—representation of the surface of the earth. Its distortions were unrecognized or disregarded.

Now we move into an age in which it may be a matter of life or death to visualize instantly the shortest path through the air from, say, Washington to Chungking. On a Mercator map this line starts almost directly north across Hudson's Bay and disappears off the top. It reappears from nowhere just east of the Taimir Peninsula in Siberia, moving almost due south. Obviously, the relationship of Washington and Chungking by air is not well portrayed by Mercator.

But on a polar azimuthal equidistant projection, that relationship is a practically straight line. Upon a gnomonic or central perspective map, any "great circle" route in any direction appears as a straight line; but less than half the world can be shown at one time in this projection. An azimuthal equidistant map can be centered upon any point on the earth's surface. The Denver City Plan Commission recently produced one centered in Denver intended to display incontrovertibly the conclusion that Denver was destined to be the postwar crossroads of the air world, sharply threatening Wichita's claim to that distinction. (Oddly enough, Glareanus produced the first polar azimuthal equidistant map in 1510, fifty years before Mercator. But nobody saw any use in it, since everybody sailed by compass.)

Today we recognize that any attempt to represent the surface of a sphere upon a plane must involve distortions. An air force of two million men has suddenly made us sophisticates: we are prepared to choose our distortions self-consciously. Mercator has lost his preeminence.[1]

Yet we administrators still try to project global human relationships on a flat sheet of paper by drawing what we call organization charts. In an age when administrative relationships were presumed to be in terms of command and obedience, a "structural organization chart" perhaps portrayed correctly the compass bearing of superior and subordinate. But now we have moved into an age of psychological insights that have added a new element, a new dimension, to our relationships. Today we seek the great circle that will provide the shortest line from a technical specialist on a central staff in Washington to the manager of a district office in Idaho: that will fly through the rarer air of cooperation and creative participation instead of plowing the denser waters of command.

Both practitioner and theoretician have plotted these new directions. Edgar W. Smith, in his sterling paper, "The Relation of Organization to Management," before the Graduate School of the Department of Agriculture, expressed profound insight in these pregnant sentences:

[1] Most of this learning is derived from a fascinating 32-page pamphlet, *Maps and How To Understand Them*, offered free by Consolidated Vultee Aircraft Corporation, P. O. Box 157, New York. So eager is the American public for this mind-stretching fresh vision that the sponsor has distributed over 325,000 copies in response to 200,000 requests in the last few months.

Now, an effort has been made in these paragraphs to define rather specifically the three types of contacts and relations that prevail between the various strata of our organization. They embrace, first, lines of direct authority; second, lines of informational and advisory contact, and, third, lines of delegated authority. *The successful day to day operation of our business demands a great deal of common sense and good business judgment in the exercise of these contacts.* [Italics mine.] A functional staff head needs clearly to appreciate the necessity for proper coordination, and he should as a matter of working habit handle through his own and over his superior's signature those things which are of management aspect. He should differentiate clearly between matters of an advisory, informational or routine nature which can be taken up by him with his corresponding functional head, and things of a management aspect which should go through his line superior.[1]

Or, as Smith also put it, the only person in General Motors Export Corporation who acted always in a "line" capacity was the president.

Macmahon put forward the same understanding more systematically in a "theory of dual supervision" that he advanced in a not sufficiently known chapter, "The Rival Claims of Hierarchy and Specialty."[2] It is his thesis that there impinge upon the worker at all times influences some of which we call command, others that we call advice, the sum total of which form the matrix in which he acts. To show some of these by solid lines, others by dotted lines, may make a compass course a straight line; but it makes Greenland bigger than South America. Such a chart may serve the sailor well; but let us be sophisticated enough to be conscious of the corollary distortions and not leave them unrecognized or disregarded.

Once upon a time I saw a three-dimensional organization chart. Henry Toll, the onlie begetter of the Council of State Governments and its collaterals, the American Legislators Association, the Governors Conference, the Association of Attorneys General, and the rest, realized that a single plane could not encompass the interrelationships of federal, state, and local governments necessarily involved in the operation of his congeries of organizations. He caused to be wrought an edifice of three levels, represented by wooden planks, with a multitude of vertical dowel rods joining them. The rods and the surfaces of the planks were painted to differentiate judicial, legislative, and administrative areas and lines of relationship. To the irreverent observer (and I never saw any other type) it looked like a squirrel cage or a model of a Grecian temple. Even its architect eventually recognized it as more bizarre than enlightening.

So far I have stressed the likeness of a chart to a map as a graphic device. Dr. Furia in his pamphlet offers another analogy. In a series of seven "Cautions in the Use and Interpretation of Charts" he says, "Remember that the chart pictures the organization as of a certain date. It is a 'still' shot in a changing organization and hence does not show the adjustments that are continuously occurring." Alas, it is the essential defect of an organization chart that it can never be a picture of the organization today: as in the White Queen's offer to Alice, "The rule is jam tomorrow and jam yesterday—but never jam today."

Thus the administrative analyst may chart an organization prospectively: he puts down the relationships that he would like to see obtain between an as yet undetermined group of people. The only certain prophecy that can be made is that no recruiting officer will ever be able to find the correct complement of round and square pegs to fill the designer's holes. The moment the organization is staffed, the chart will be invalidated, because it will turn out that some able, forceful, and aggressive individual in a square hole marked "advisory" will begin to attract to himself responsibilities intended for a man in a round hole of "authority." Or an incompatibility will appear between two experts, both essential to the organization, that calls for bending lines on the chart. (Dr. Furia is ready for that emergency with one incorrect and two correct examples of a "by-passing device.") The surest proof of my point is to observe what happens when any person, even below the top echelon, leaves and is replaced. Instantly there are subtle, sometimes pronounced, changes in radiation of influence and authority, reflecting the new man's personality and way of doing things.

If the chart is not a picture of tomorrow, it must be a picture of yesterday. In a charming essay, "Dog Fights and Organization Charts,"[3]

[1] *Administrative Management: Principles and Techniques.* (U. S. Department of Agriculture Graduate School, 1937), p. 63.

[2] Macmahon, Millett and Ogden, *The Administration of Federal Work Relief*, Chap. ii.

[3] *Dun's Review*, December, 1938.

Thomas Roy Jones, President, American Type Founders, Inc., latterly of the War Labor Board, illustrates the point. He tells of the man shown on the chart as "comptroller" who developed the practice of calling a group of major executives into his office, arguing out a problem until a consensus was reached. The president "began to receive penciled notes saying, 'We had a little meeting on such a matter and decided so-and-so. If agreeable to you, we'll go ahead,' signed with the initials of the comptroller." After the "comptroller" had sent up these chits for about six months, they changed his place on the chart and labelled him, "Assistant to the President." He had been *acting* as assistant to the president long before it was feasible to record that activity as a "function" on a chart.

Another of Dr. Furia's salutary cautions is that "the chart is necessarily an oversimplified picture of organization and cannot show *all* the minor working relationships and cross relationships." This is Dr. Furia's way of recognizing the distortions of a plane projection from a sphere, but he has oversimplified his statement by using that word "minor."

Dr. Furia prefaces his instructions for chart-making with a glossary of chart-making terms. Alas, he has no better success than the rest of us in deciding upon a fixed, limited, definite meaning for some of our commonly bandied administrative lingo—and sticking to it. "Function" is particularly troublesome, and I, for one, vote that we leave it to the mathematicians, the maîtres d'hotel, and the medicos, if they think, they can use it. Dr. Furia defines "function" as "Activity in terms of purposes, aims, and objectives." Yet a "functional organization chart" is merely "one which includes a description of the specialized work of subdivisions." A "functional type of organization" is "one in which authority flows to subdivisions from more than one source according to the activities or specialties involved." A "position" is defined as "a group of functions performed by one person." Surely these are not cognate uses of "function."

Apparently a "functional organization chart" is merely a "structural" chart to which is added, in each box, a short statement of what that officer does. Dr. Furia is not alone in that usage. An excellent *Control Manual*, prepared by the Control Division, Headquarters, Army Service Forces, offers such a chart under the same title. But certainly the title should be reserved for a more significant tool of functional analysis than a structural chart with descriptive labels. Is not a flow chart more truly a tool for the analysis of activities? Perhaps I am merely suggesting that Dr. Furia has chosen too broad a title for a handbook on charting structure.

A glance at some of Dr. Furia's models reveals that, like Ptolemy, Waldseemüller, and other great cartographers, he has had to struggle with problems of projection. His Diagram 20 presents the technique for painting a portrait of a bright young man who serves as administrative assistant to a commissioner and two deputy commissioners. The solution is to present three boxes, each in the position for a "staff" relationship, appended by a sidearm from the boxes of the commissioner and the two deputies. To indicate that this is a portrait of one person (like Marcel Duchamp's "Nude Descending a Staircase" or Gjon Mili's stroboscopic photographs) an asterisk appears in each of the three boxes. This bit of cartography involves the same difficulties as Mercator's attempt to portray the great circle route from Washington to Chungking—that disappeared off the top of the map.

I do not deny that there is a kind of utility in drawing Diagram 20. I ask only that the students in the "in-service training courses on chart-making" for whom the manual was prepared be made conscious of that utility. If I were surveying an organization and I found a bright young man in the posture portrayed in Diagram 20, I should be certain that I had found a troubled young man, living in perpetual need of adjusting his relationships to three bosses, harassed by the threat of competing and conflicting demands on his time. I should want to make sure that the deputy commissioners understood that the bright young man could say no to them when engaged on a mission for the chief. Before I was finished, I might well seek a redefinition of relationships that would show the primary responsibility of the assistant to the chief: I should have to invent a device different from Diagram 20 to portray his relationships to the two deputies. Incidentally, the title of Dr. Furia's pamphlet suggests that he deals with the interpretation of organization charts, as well as their construction. If interpretation means fixing the mean-

ing of symbols on a legend, the pamphlet may be said to include the topic. But there is none of the kind of interpretation in which I have just indulged—in which we construe the human relationships and responsibilities implicit in the lines and boxes on the chart.

Dr. Furia presents several pairs of organization charts—before and after the application of his cartographic principles. The attempt to picture the secretary of the Department of Markets is particularly interesting. In municipal administrative parlance in New York a secretary is not merely "a person who attends to correspondence, keeps records, etc.; also used . . . to designate the exempt official of an agency usually in charge of personnel." On the "before" chart, he appears in the third echelon, under a commissioner and a deputy commissioner, on the same line with the chiefs of operating bureaus. On the "after" chart, "staff" advisory positions are shown attached to the deputy commissioner: these include "general inspectors," a legal adviser, and a "confidential examiner." In this last box appears the comment: "Duties taken over by secretary to department."

The secretary appears in the next echelon with this statement of functions: "In charge of civil service, personnel assignments, time sheets, vacations, Kosher law enforcement, press statements and releases, relations with food trade and industrial organizations." Diagram 35 of the manual teaches us that "service subdivisions" that perform "work for the other organizational subdivisions, such as the keeping of employee payroll records, furnishing information to the public, . . . etc." are to be attached to the superior echelon by a double line, not a single line.[1] The secretary to the Department of Markets is attached to the deputy commissioner by but a single line. Is this because the chart-maker is properly confused by the statement of functions? Certainly Kosher law enforcement is not a service activity. I don't know, but one possible guess is that the department was given some responsibilities for enforcing Kosher laws; the commissioner, looking over his staff, recognized that the departmental secretary was a man well regarded in Jewish religious and fraternal circles; he believed that it would inspire confidence among the affected constituency if they saw their law was to be enforced by their respected friend. So the commissioner, to the dismay of the cartographers, asked a "service subdivision" to undertake a "line" operation. Another guess is that the commissioner promoted the Kosher law enforcement officer to the secretaryship—but make your own guess and then ask whether the chart reveals or confuses.

If structural organization charts have to be made, there is certainly advantage to having a uniform symbolism and graphic techniques. Dr. Furia's manual is a commendable contribution to this end. I am afraid that his ideal is as far from realization as that of other schools of cartographers. I am no engineer or maker of maps (though a delighted reader of them), but I can recall at least three noble statements of systems of uniformity for map symbols: one from Los Angeles, one from the National Resources Planning Board, one from the New York State Bureau of Planning. These dreams of a universal language rank with Volapük and Esperanto. Unfortunately, the Basic English of map symbols or organization charting has not yet appeared.

Perhaps one reason is that the chart-makers, like the inventors of universal languages, seek unnatural uniformities. Thus, Volume II of the *Control Manual* of the Army Service Forces, "Basic Principles of Organization," gives two pages of rules for organization charts, stressing symmetry in arrangement as "one of the principle ways of indicating the logic of the organization structure." Warning that "symmetry should not be forced artificially," the author says: "Good organization should result in a symmetrical chart arrangement since organization as such is basically a grouping of several subordinate units under coordinating superior units in symmetrical fashion." There is no room here to argue this proposition; but one is tempted to oppose the dogmatic statement with an equally dogmatic, "Nonsense, if I understand what you mean by 'symmetry.'" Indeed, I submit that one of the dangers of graphic display is that the desire to please the

[1] Other designers prefer to show the service units on a separate line, connected by a sidearm from the vertical line between chief and operating subordinates. See a memorandum, "A Technique of Organization Charting," prepared "for discussion and further study" by the Organization Planning Section, Civilian Personnel Division, Office of the Secretary of War, October 1, 1942. This memorandum proposes that a simple, solid vertical line denote administrative authority, solid parallel lines denote lines of military control.

eye will tempt the analyst into finding or forcing false organizational symmetries.

We need and can use more effective graphic tools for administrative analysis. A structural organization chart may be such a tool (whether or not it contains job descriptions, it is still a structural chart, not functional). But no one should be allowed to use it who is not sophisticated enough to remember at all times that it presents inevitable distortions—probably no one below grade P-5 or CAF-12 in the federal service, certainly no one in a school of administration. It is to be hoped that the Municipal Training Division of the City of New York will give us a handbook on the construction and use of the flow chart, a graphic device of much greater utility in administrative analysis.[1]

[1] Volume III of the Manual for Control Officers prepared by the Control Division, Headquarters, Army Service Forces: "Work Simplification," devotes several pages to the construction and use of flow charts.

Bureaucracy in the Field

By George F. Gant, Tennessee Valley Authority

FEDERAL FIELD OFFICES: A Report Prepared by the Library of Congress Setting Forth the Factors To Be Taken into Consideration in the Selection and Establishment of Federal Field Offices. Letter from the Director of the Legislative Reference Service, Library of Congress; Senate Document No. 22, 78th Congress, 1st Session. Government Printing Office, 1943. Pp. vii, 59.

MEMORANDUM ON REGIONAL COORDINATION, by the Special Committee on Comparative Administration of the Committee on Public Administration, Social Science Research Council. Committee on Public Administration, Washington, 1943. Pp. 46 (mimeographed).

ALL the federal departments and almost all other federal agencies have offices in the field. This multiplication of the horizontal and vertical layers of government is of immediate concern to the Washington agency because of the problems of Washington-field and interagency relationships; to the states because of the multiple contacts involved; to the citizens who are the objects of these numerous offices of service and control; to the Congressmen who watch with bewilderment the amazing growth of their creation; and to the political scientists who find little of politics or science in charts of the resulting maze. Emergency and war agencies have added numerous field offices to cope with new federal problems. In turn, each of the other agencies, the citizens, and the Congress must deal with these new functions and agencies, and the political scientist will try to understand and appraise them. Ernest S. Griffith, transmitting *Federal Field Offices,* a report by the Legislative Reference Service, Library of Congress, wrote: "As one agency after another sets up field offices the Congress obviously raises questions as to the soundness of the areas selected. This study is designed to make available to Congress basic data for consideration of the afore-mentioned problem." The report deliberately excludes from consideration the broad general problems of regionalism and devotes itself to this question: "When should the special geographical areas commonly known as regions be established as field units for Federal administration, and when should States be used?"

The federal department, agency, or bureau faced with the task of establishing field offices is offered the following principles for defining its regions and allocating regional authority and responsibility:

1. It is desirable to have small regions when the objects of administration are relatively many and large regions when the objects are few.
2. Regions should be small enough to allow staff to maintain contacts with the citizens involved and to permit ready adaptation to local conditions, but large enough to keep the staff continuously occupied.
3. There should be a clear delineation of functional administrative jurisdiction when more than one field agency performs functions which may overlap.

4. Every field unit should have an administrative head to achieve unity of command.
5. The lines of control between the central agency and the field offices must be definite and under the direction of a single superior.
6. The delegation of power should be as complete as possible to save time, energy, and expense, such delegation to be governed by the nature of the function, the work load, and the relationship between the field offices and the state and local authorities.

Non-administrative factors which condition the successful performance of specific functions of regional organization are summarized in *Federal Field Offices* as geographical features, distribution of population, distribution of wealth, location of industry, influence of metropolitan areas, and transportation facilities. In addition to these factors, other and primarily administrative considerations must be taken into account, such as the use of the same region by agencies performing related functions, equalization of work load, span of control, unity of practice, and deconcentration. A large administrative region, encompassing a number of states, is indicated when the function is closely related to geographical conditions, concentration and distribution of wealth, location of industry, the influence of metropolitan areas, transportation facilities, and unique administrative conditions. The state, on the other hand, is better utilized when the function is already organized on a state basis (as, for example, education), where state boundaries or state reports and statistics are significant, where adaptation to local needs is uppermost, where state officers will perform federal functions, where savings can be achieved, where the work load requires many field areas, or where close cooperation and careful liaison with state and local agencies is paramount to the success of the function.

Federal Field Offices concisely and accurately enumerates factors influencing regional organization of Washington agencies. It does not deal with the underlying assumptions of current federal organization. The report therefore passes lightly over the question, "Could not all Federal administrative and planning regions use the same boundaries and the same headquarters?" by answering, "All the reasons for setting up administrative areas of one size or another, of one type or another, and of one relationship to Washington or another, can be brought to focus in a single sentence, namely: Field organization must depend primarily upon the nature of the function performed. All other criteria are developments of or corollaries to this one." The report approaches the problem of federal field organization in terms of established functions, thus excluding extensive comment on problems of interagency coordination. The *Memorandum on Regional Coordination*, on the other hand, is a timely exploration of some of the latter questions: ". . . how to secure coordination between various programs of the federal government in the regions; how to keep the programs of regional agencies in balance with total regional need; and how to coordinate specific operations in the regions which affect programs of other agencies." To secure coordination within regions, according to the *Memorandum*, three phases of coordination must be achieved, namely, central coordination in establishing programs for, and issuing directions to, regional agencies; regional coordination in determining requirements; and regional coordination in carrying out programs and directions. Central coordination, although "an indispensable prerequisite of regional coordination," is excluded from further review in the *Memorandum* and attention is devoted to two main alternatives to achieve coordination among federal agencies in the regions: interagency conferences and special coordinating machinery.

Consultation and conference constitute the normal device for adjustments among agencies with respect to programs and activities. It is almost the only device used in Great Britain and the main device found in Germany. These countries promote interagency consultation by appointing subject-matter aides—liaison officers who maintain contacts with aides in other agencies. The *Memorandum* endorses the idea of consultations stimulated by the designation of liaison officers as one worthy of wider use in the United States. It points out, however, that the aides should be officers primarily engaged in other tasks, and not additional employees for whom the liaison function would be primary. It finds that the use of the conference method is limited by the lack of machinery for compromise in the event of controversies be-

tween agencies of equal rank; lack of a chairman who might bring agencies together and moderate their differences; and the lack of responsibility for initiating conferences. These limitations are more severe in the United States than in Great Britain because in Great Britain the departments have larger fields of jurisdiction, ministries have more often exercised their multiple functions through one set of regional and local agencies, there is no duplication of authorities at the state level, and the organization for resolving controversies at the national level, through coordinating committees and otherwise, is highly developed.

The second alternative method of achieving interagency regional coordination—the establishment of special coordinating machinery—is held by the committee to be more pertinent to the problems of the United States than is consultation. Of the types of coordinating machinery listed—namely, combinations of department jurisdictions, a regional board, a regional convener, a regional multi-purpose or over-all agency, a kind of regent representing the central government for all agencies within a region in all respects—the committee clearly prefers and advocates the regional convener for the United States. The basic idea is that a regional convener would be appointed for each of ten or twelve regions for the general purpose of coordinating (not directing) federal field agencies by bringing agencies together and acting as "convener, moderator, stimulator, and mediator to bring about satisfactory settlements." Such agent would, in addition, watch regional needs *in toto*, confer with Washington and other conveners and state governments, and even provide centralized administrative services and, in time, receive delegations of program and administrative authority from Washington. In short, the *Memorandum* concludes that "Regional coordination can be greatly promoted by the appointment of some kind of federal agent-general in each region."

The report of the German Government Commission on Federal Reform of 1928-1930 contains the analysis so intriguing to the committee and reflected in the *Memorandum*. Although both Great Britain and Germany have a regent-type method of regional administration available for use in vital emergencies and for use in controlling wartime dependencies, neither has used the system regularly. In Germany field administration was left to the states under a principle of "administrative federalism" or of "exclusive State rights." The numerous federal agencies were uncoordinated at the regional level. The basic idea of the German Commission on Federal Reform was that "'. . . in the interest of administrative simplification,' all federal agencies within each region should be combined at the top under a federal agent-general. He would have powers of supervision and direction with respect to administrative simplification, subject, of course, to central supervision. It was expressly stated that it was not necessary to give him power to interfere in all substantive functions and responsibilities of the respective agencies." The *Memorandum* applies this idea of a regional convener to the situation in the United States, having abandoned as impracticable either the extensive combination of jurisdictions or the wide development of regional authorities such as the TVA because "It is . . . probable that to tackle the problem from this extreme angle would meet with a negative response except, perhaps, in a situation of dire necessity."

These two reports, *Federal Field Offices* and *Memorandum on Regional Coordination*, review two sides of the same problem: how can field offices be established and coordinated effectively to perform their functions and thereby accomplish the purposes for which they are created? Neither report, however, examines the premises upon which its conclusions and recommendations rest. Each reader will visualize a field organization in accordance with his own assumptions of governmental structure, and the principles and recommendations presented in these reports will take shape and have significance in accordance with those assumptions. Two Washington agencies could adhere to the principles, account for the factors, and apply the ideas of field-office coordination with two entirely different results, depending upon their attitude toward those assumptions of government administration. One administrator might assume that only the minimum number of delegations should be made to the field office, with a maximum number of controls reserved to Washington. The other might assume that a maximum number of delegations should be made to the field office, with a minimum number of Washington controls. These assumptions are subject to judgment and, al-

though crucial in forming the tone of governmental administration, are a product of individual points of view which are the starting point of agencies which shape administrative patterns.

A perfectly sound principle can have diverse results according to the point of view of the official who applies it. Notice, for example, the principle that "delegation of power should be as complete as possible." On this point *Federal Field Offices* is concerned with the division of authority between Washington and the field:

> It has been remarked that a concentration of power at Washington is desirable: (a) when the central officers are under civil service and the field officers are appointed by patronage, (b) when the activity is of a type particularly exposed to the danger of corruption and graft, (c) when the policies and standards must be absolutely uniform throughout the country. Deconcentration is (a) desirable when the function is affected by local and regional variations and (b) indispensable when the function is principally that of promotion and personal contact.

These excellent criteria for determining when a delegation is "as complete as possbile" have meaning only in terms of the judgment of the official or agency applying them. Does one assume that authority should be delegated to the field, thereby putting the burden of proof on those who demand reservation? Or does one assume that authority should not be delegated and that the burden of proof belongs with those who demand discretion? The question is one of trust versus distrust, of control versus freedom, of uniformity versus diversity.

The issue is: Should field officers be held to compliance with detailed procedures and regulations, or should they be held to the achievement of program results? If in the development of managerial practice the field office is compelled to conform to detailed procedures prescribed by Washington, it will have neither the opportunity nor the inclination to develop methods to fit the field job. Inevitably the field staff would measure its own accomplishment by the degree of adherence to Washington procedures rather than by the degree of program accomplishment. The objectives of such externally designed procedures are usually good and necessary, but when little or no discretion is permitted in their application there is frequently little probability that the objectives will be accomplished. Freedom of managerial decision in the field, on the other hand, makes it possible to devote staff energy and ingenuity to the achievement of program goals and to the development of managerial practice for that purpose.

It is necessary, of course, to have uniformity in national policy but it is very often not only unnecessary but undesirable to attain uniformity in managerial practice and procedure. Many government agencies are now failing to establish national policies adequately because they fail to distingusih between policy and procedure and because the time of their staffs is occupied with procedures and other operating problems so exclusively as to impede their definition of policy. Likewise, the preoccupation of many Washington officers with the field rather than with their own staff work leads to jurisdictional problems between field and Washington and between the several Washington staffs in a manner which further confuses the issue and impedes progress in achieving program results.

Would it not be well, would it not minimize bureaucracy, to assume that decisions should be made in the field, limited only by a broad framework of policies and standards, by reports of accomplishment, and by competence of staff? How different the federal pattern of red tape would be if procedures were based on the assumption that people could be trusted, rather than on the assumption that they must be controlled. This is the heart of the delegation problem. Let Washington establish policies and standards and let the field do the work, subject only to those controls clearly shown to be indispensable to the function. This plea may fall upon deaf ears. One may search long before one finds an administrative approach based upon confidence in the other agency or the subordinate in the administrative relationships between and in government agencies. The legislation creating the General Accounting Office and the Civil Service Commission, for example, puts the emphasis not on standards and service but on check and control. Field offices are set up with limited delegations rather than with full delegation with limited reservations. It is the starting point, the basic assumption, the location of the burden of proof which marks the difference. Of course, certain controls are necessary. It is obvious that an agency which cannot trust its officers because they are subject to some

outside political or pressure-group allegiance, and which cannot displace them, must hold their work in check.

If there is any reason at all for having a field office, it is because the nature of the function requires its performance in the field rather than by absentee administration. There are those who assume, when dealing with problems of administration, that the federal government is an entity and that it should be considered one organization, have one logical chart, a set of uniform regions, act as a single employer, have one set of management rules, and, generally, behave as one body. Many textbooks instill this approach. *Federal Field Offices* is not consistent on this point in so far as it points out that although the same factors enter into the field organizations of governmental units and of private undertakings or associations (industry, labor, religion, fraternal organizations) the differences are more striking than the resemblances. The authors are struck by these differences because they seem to consider the federal government as one complex entity, as a unit to be compared, in this respect, with a single industrial or fraternal enterprise. Actually, of course, the federal government is made up of many functions and many parts, much in the same way as we consider agriculture or industry or commerce as having many facets and points of contact. Approached in this way, governmental organization and administration would be appraised by the excellence with which functions are performed in the field rather than by the way they fit some centrally devised master chart and plan. An approach to federal administrative problems from this angle would avoid such troublemaking and unverified assumptions as "Uniformity is necessary," "We must achieve coordination," and "The government is one employer" that really jam efforts to achieve a responsive and flexible discharge of functions by the several agencies. It is difficult to see that it makes good sense to apply to one field office the procedures of great detail that are drawn to fit many dissimilar situations in many other field offices.

Whereas the report *Federal Field Offices* accepts the assumption that the several specific functions of the various federal agencies would remain paramount in shaping field office organization, the *Memorandum on Regional Coordination* appears to assume that the field coordination of all field agencies is desirable *per se*. Anyone will grant that the machinery for coordination must be provided where it would assist in the performance of a function. It is all too easy, however, to pass from this proposition to the conceptual imposition of a pattern of machinery in the interest of a uniform organization chart, whereas prior to any effective field coordination there must be a delegation of authority sufficient to provide the discretion of judgment necessary to the give and take of coordination. If one conceives the federal government as one function, it is logical to see a single policy-forming staff in Washington and a single line of application in the field. But this approach seems to overlook the primary purpose of field organization, namely, to develop a flexible response to and handling of concrete problems, opportunities, and relationships which arise in the field.

This is not to deny that coordination is important and necessary; but coordination is never an end in itself. If one assumes that the federal government is an entity and that coordination is primary, he approaches problems of governmental organization from the top and center, and puts the burden of proof on the agency or function which requires an exception. If one assumes, conversely, that coordination is a means of facilitating the performance of specific functions, coordination thereby becomes a tool, a technique of secondary importance, and the burden of proof is placed on him who wants a uniform organization chart with corresponding regimentation of administrative behavior.

The *Memorandum*'s handling of the TVA reflects this conflict in attitude and approach. It states "The TVA represents an original American approach to such regional multipurpose agencies. Yet the general application of such ideas in all regions and their pursuance disconnected from profit-making enterprises would involve a radical shift of administrative habits in the United States." This is an erroneous conception because the TVA is not predominantly a profit-making enterprise; it is primarily an agency with multiple functions defined in terms of regional problems and resources. But the chief fault, the prime misconception, is the failure to recognize that the TVA was established not only to correct administrative faults of past approaches to resources development but to respond to the needs of the

region "envisioned in its entirety," as the President said. A clear distinction should be made between administration by regional offices and administration by national agencies with field agents. The theory of regional administration emphasizes knowledge acquired and decisions made on the spot by those who are conducting the program. Most federal administrative areas, unfortunately, have been set up largely to secure arbitrary reduction of the span of supervisory control or other internal administrative advantages. Those who set them up are then reluctant to delegate authority and responsibility. Why do they not think first of the job needs and the regional problems and opportunities? If these real objectives were uppermost in their minds, they would be anxious to delegate and reluctant to reserve controls.

The reports, *Federal Field Offices* and the *Memorandum on Regional Coordination*, reflect the not-to-be-denied attention being received by problems of inter- and intra-federal agency administration. Both documents are authoritative statements, worthy of study and application. The questions to be raised, and they are prior questions, are (1) should delegation of responsibilities to field offices place the burden of proof on the delegation or on the reservation, and (2) should interagency coordination of field offices be a result of the need of effective performance of field functions or of the desire for a uniform management pattern for the federal government? If reservations to central Washington controls are limited and if coordination will not result in arbitrary uniformity and standardization, let the agencies apply the excellent suggestions of these studies as soon as possible.

Collective Enterprise

By Louis Wirth, University of Chicago

DEVELOPMENT OF COLLECTIVE ENTERPRISE: DYNAMICS OF AN EMERGENT ECONOMY, by SEBA ELDRIDGE and ASSOCIATES. University of Kansas Press, 1943. Pp. viii, 577. $4.50.

THIS work on collective enterprise is itself a collective enterprise to which thirty scholars have contributed. Despite the editor's claim that it is "not a symposium but rather a closely articulated inquiry focussed upon specific problems and governed by a common frame of reference," it falls far short of a balanced, integrated, and systematic portrayal of the collective aspects of American life. Considering the fact, however, that only about half of the collaborators were available on the campus of the University of Kansas for personal conferences, a fair degree of similarity in approach has been achieved.

The inquiry was designed to throw light on eight aspects of collective enterprise:

1. Growth of collectivization as indicated by capital equipment, current expenditures, labor employed, and/or extent of services rendered.
2. Factors responsible for this growth, including public opinion, group pressures, and special promotive efforts focussed on practical issues, together with limitations of private enterprise, failures of legal regulation, and the like.
3. Type of ownership and control, whether by the state (federal, state, local, or a combination of these) or by voluntary associations; and representation of workers, consumers, and public in the formulation of plans and policies.
4. Administrative organization, whether centralized, decentralized, or federative in structural pattern; nature of authority exercised by central agencies (e.g. legislative assembly, executive department, or federation of cooperatives), and related questions.
5. Fiscal policies relative to capital funds, operating revenues, service charges, and other features.
6. Work incentives—pecuniary rewards, service motives, vocational standards, and others.
7. Working conditions—qualifications for positions, rates of pay, factors in promotion, security of tenure, provision of insurance, management of personnel, safeguards against accident and disease, organization

of workers for bargaining or other purposes.

8. Efficiency of service as judged by accepted standards, and also as compared with like services of private undertakings (where competent studies of these questions have been made).

The collaborators were instructed to emphasize the first two of these eight fields as the main subject of their inquiry.

Professor Eldridge approaches the material with the hypothesis that the primary factors in socialization, or in the extensions of collective enterprise in a so-called capitalistic democracy, "are to be found in the pressure of consumer and general public interests, not in pressures applied by labor groups." In this respect he agrees with the conclusions of Sidney and Beatrice Webb that the nationalization and municipalization which they found going on in English enterprise were prompted by the interests of consumers and the community as a whole, rather than by the interests of wage earners. In this matter Professor Eldridge believes himself to be correcting a widely held Marxian dogma to the effect that a collectivist regime is to be established through action of the wage-earning class.

Since the two key terms in this hypothesis are "collective enterprise" and "consumer needs or interests," it is important to observe how Professor Eldridge defines these terms. By collective enterprise Professor Eldridge means enterprise in which capital is owned by groups, not by individuals. This would make the most important enterprises in the nation fall under the category of collective enterprise, since corporations are obviously "owned by groups," but to define collective enterprise in this manner defeats the very purpose of the inquiry. Fortunately, the writers on specific problems do not adhere to this definition. They take into account when writing of collective enterprise the end purpose of the activity, particularly whether it is carried out for the profit of individuals who have capital invested in it; whether it is carried out to render an essential service to its members, like a cooperative; or whether it is a non-profit agency designed to render a service to a public at or below cost or free.

Professor Eldridge also distinguishes between two kinds of consumers: (1) *"final consumers,* illustrated . . . by consumption of food, clothing, medical care and the like—consumption whose prime object is to satisfy basic human wants, *not* to contribute to further production"; and (2) *"intermediate consumers* or . . . buyers or users of producers' goods, including buildings and machines, raw or partly processed materials, fuel and power, short and long-term credits, transportation services, and many other varieties." If the latter consumer interests are considered part of the pressures toward collectivization, then the term consumer interest acquires so broad a meaning as to be useless as a means of differentiating between fundamentally different motives and hence loses its edge. It would be interesting to know whether intermediate consumers exercise more or less influence than ultimate or final consumers. For, if they do loom as significantly as final consumers, it would appear that we have a condition in America where some profit-seeking enterprises are themselves the factor in the collectivization of other enterprises hitherto carried on for profit.

The analyses are divided into three major categories: (1) fields already collectivized; (2) fields undergoing collectivization; and (3) special problems. Among the fields recognized as already collectivized are: the protection of persons and property; roads and streets; harbors and waterways; postal services; water and sewerage works; land reclamation; education and research; social work and institutional care; social groups and fraternal societies; libraries and museums. Of the fields undergoing collectivization, the following are treated: forestry; electric power; rural resettlement; housing; credit and banking; property insurance; life insurance; minimum income insurance; medical service and health care; recreation and leisure-time activity. The following are treated as special problems: consumers' and producers' cooperatives; organized labor as a socializing agency; public opinion in the development of collective enterprise; financial aspects of collectivist developments; the significance of economic planning.

It is quite obvious that the treatment of so vast and heterogeneous a body of subject matter could hardly make sense if it were not for an organizing perspective. The editor tells us that when he "was very young and idealistic he was quite sympathetically disposed toward

'socialism'," and that he "was sure that a socialist regime would be brought about by the wage-earners, who in due season would become class conscious, effect the necessary organization, and some fine day overthrow their oppressors, the wicked capitalists." As he grew older he was beset by doubts as to all of this, particularly as to whether the Marxian notion concerning the exploitation of the working class and the eventual class consciousness of the laboring masses would lead to their establishing a system better suited to their interests. He found particular basis for his doubt in the history of the public services, especially in democratic countries such as the United States. It dawned on him that many fields of enterprise in this country were already on a predominantly collectivist basis; that many other fields were undergoing collectivization; and, more significant still, that the proportion of collective enterprise in our economy as a whole was steadily increasing.

Like so many others before him, Professor Eldridge discovered in his wonderings about when the revolution would begin that the revolution had in part already taken place and that it was still going on. A revolution does not necessarily have to take the dramatic form of the storming of a Bastille and the setting up of a guillotine in the middle of Wall Street. The most important part of a revolution is the silently working forces that re-make institutions and attitudes. Perhaps the most important revolution in history was the industrial revolution, which was not recognized as having taken place and for which not even a name was found until it was nearly over. Such a revolution, this volume shows, has been taking place and is still going on in the United States and in a good part of the rest of the world. Various phases of it have been recognized, such as the "managerial revolution," involving transformations in the control of economic policies. Other phases of it might be labeled the "corporate revolution," to designate the transition from individual ownership and operation of productive resources to their ownership by those modern creations of the state known as corporations. A similar revolution has gone on in the state itself, in the course of which it has become transformed from the negative and predatory role of the police state into the positive role of the modern service state. The later phases of this transformation consist in the acquisition by the state itself of enormous productive functions such as are dramatically symbolized by the construction and operation of giant power projects, of shipping enterprises, of housing projects which are either replacing private profit-seeking enterprises in these fields or are operating parallel to them. Moreover, it is becoming clearly recognized, as Professor Eldridge points out, that "the 'private enterprise system' could not operate at all without a great variety of protective, regulative, and auxiliary services on part of the state. Property in all its forms is the creature of the state, for without legal sanctions it could not exist as we know it. So is the corporation, now the dominant form of business organization."

No one will be startled by Mr. Eldridge's revelation that the family is a collective enterprise, but there will be some among the readers of his treatise who will be more interested in the question as to who holds the mortgage on the family homestead and how many great productive enterprises are owned by family fortunes such as those of the Ford Motor Company or the A & P grocery chain. We need not be told that the school is a collective enterprise, though, as the chapter on education shows, this is far from true. What we would have been more anxious to know is just how much and why so large a proportion of education is carried on with public funds and under public control as compared, for instance, with medical care. On this question, however, we get only slight evidence. As to the church, it is hard to conceive of it as anything but a collective enterprise, although it would be interesting to know the answer to at least two questions relevant to this inquiry regarding the church: (1) what influence, if any, toward socialization religious organizations have exerted; and (2) to what extent the ownership of property by religious organizations and the tax exemption accorded to religious organizations are factors in inhibiting the trend toward collective enterprise. There is something bordering on the naive about Mr. Eldridge's musing that "of our five major social institutions, the family, school, church, and state rest on a collective basis (if we take group ownership as our criterion of collectives); and only industry (specifically, production for the

market) is for the most part individually owned. If we add agencies of mass communication as a sixth basic institution, we still have a ratio of four to two in favor of the collectives." To say the least, it is improbable that we will get a conception of the relative importance of individual and collective enterprise or of the trend toward one or the other by this type of generalization.

It is somewhat tiresome to witness writer after writer in the compendium throw his stone at Marx and his theory of the class struggle. The very unanimity of the writers on this point makes one suspect the central thesis of the volume, namely, that the history of collective enterprise in the United States is not the history of a class struggle. If we interpret the Marxian conception of history a bit more generously than has been done in this volume, there is ample evidence in these pages that collectivization of enterprise has not been unrelated to the concentration of wealth and power in the hands of the few and to the growing awareness on the part of the many that the promises of democracy remain to a large extent unfulfilled. Even if one were to accept the by no means unequivocal evidence here presented that the collectivization of an increasing number of enterprises is not the direct and primary result of militant working-class agitation, it would still not follow that such enterprises as public education, social security measures, and public ownership and operation of water systems and power plants are not in considerable part the result of the indirect mass pressure from below. It is true, of course, that in some historic instances the workers have resisted public ownership for special reasons, but it does not follow that, on the whole, the low-income groups have not been a primary force working toward the extension of public services. It must be recognized that the American workers have not been organized as a class as effectively and as early in their history as their European counterpart. The existence until recently of the frontier, of the tradition of individualism, and of the wide margin of opportunity to rise in status has retarded working-class organization, but the political parties and ideologies of America have not remained unaffected by the latent power represented by the votes of the low-income groups in the land. It would take a more profound analysis of the political process and the mechanisms by which public opinion and policy are molded than is contained in this volume to substantiate Professor Eldridge's conclusion that "organized labor has often been a successful socializer, in pursuance of a consumer or public interest, with the cooperation of others sharing the interest; but it has failed in virtually all attempts at socialization in its interest as a producer group."

Students of pressure politics well know the difficulties inherent in the attempt to assess the precise amount of influence exerted by each interest group participating in policy making. In our kind of society, interests are promoted and expressed by an elaborate and often substantial machinery of propaganda and publicity which does not always allow us to trace influence to its ultimate source. Some of the congressional investigations in recent years surely could have been used as exhibits by Mr. Eldridge to show how such propaganda campaigns are organized and by whom they are financed. It is not always possible to ascertain whether those participating in a social movement such as the public ownership movement or the cooperative movement do so as consumers, as producers, or as members of the general public. We must infer the roles in which people act in public matters from the arguments their leaders advance, the organizations to which they lend their support, and the sources from which the causes gain their sustenance. One of the most interesting facts about public policy formation is the relatively negligible role played by consumers, whose importance this reviewer believes Mr. Eldridge overestimates. The reason for this is clear enough. It lies in the fact that everybody is a consumer; and when everybody is in fashion, no one is in fashion.

It is quite otherwise with the employees and administrators of an enterprise that is subject to the attempt at collectivization. Our economic interest as consumers is overshadowed by our economic interest as wage earners, salaried employees, professional men, business men, and investors; but to press a claim in these roles that would redound to our own economic advantage it is often wise to disguise it in the role of consumer interests or public interests. This may account for the fact that the writers of this volume came to the conclu-

sion that consumer and public interests far exceed in importance producer interests in the trend toward collectivization.

With due respect to the whole theory of economic interests, however, it is pertinent to raise the question whether people know in most cases what their interests are and act in accordance with them. We cannot ignore the possibility that people are often interested in what is not to their interest and that irrational factors—tradition, sentiment, prejudice and personalities, deep-seated loyalties and enmities, shibboleths, and slogans—frequently far transcend in their compulsive power upon men the cold calculations of logic.

Since none of the functions which Professor Eldridge regards as collectivized are completely collectivized—since, for instance, even the postal service still allows for the competition of the private express business—it is somewhat difficult to see the dividing line between the fields which are here treated as already collectivized and those undergoing collectivization. A reading of the chapter on rural resettlement, which is in the second category, i.e., a field undergoing collectivization, for instance, would lead one to believe that it is about as nearly collectivized as is the field of land reclamation, which is in the first category of fields already collectivized. One wonders how much collectivization there must be before a field is effectively collectivized.

Mr. Eldridge comes to the conclusion that each field must be treated as if it were *sui generis*. Considering the material he had at his disposal, one can sympathize with this hesitancy to generalize. There are certain questions, however, on which one would have liked to get the benefit of the writers' study of their respective problems and of Mr. Eldridge's synthetic judgment. Among these questions only a few can be mentioned here. First and foremost is the question as to whether the nature of the activity itself has something to do with the tendency to collectivize it. One factor that from other studies, as well as this, we can point to as of some importance in collectivization is the recognition by the community at large that certain services are so essential for the public welfare that we cannot afford to have anyone be without them. In an urban community this means such things as sewage disposal, fire protection, police protection, sanitary inspection. In the measure in which we take the democratic participation of citizens in the political process seriously and in the measure in which we respect the dignity of the personality by according to him every opportunity to develop his talents and powers toward his own self-support, toward social usefulness, and toward personal development, we regard a minimum of education as a public responsibility to be given to everyone irrespective of his ability to pay for it. And so in other fields whenever an activity becomes so important to the public interest that we want no one to do without it, we tend to make that field part of the public responsibility. A second factor which Professor Eldridge might have looked into as possibly having a direct relationship to collectivization is the possibility of metering a service. Our hypothesis might run about as follows: Other things being equal, whenever we are able to charge the individual in accordance with a number of units of a service he uses, we tend to leave it in private hands. A third hypothesis Professor Eldridge might have pursued further is connected with the question of monopoly. It might run about as follows: Whenever it is in the public interest that a given service be noncompetitive, it becomes ripe for collectivization, the first step in which is public regulation of the monopolistic enterprise. A fourth hypothesis might be that whenever an essential public service tends to be rendered at a higher cost than the consumers can afford and whenever such a service is threatened with bankruptcy, it tends to be collectivized. It would have been interesting to have recorded in this volume all of the important public services which were assumed by the community when bankrupt or when their private owners and managers could not make a profit without charging exorbitant prices. A fifth hypothesis that might have been more fully investigated is the effect of social crisis such as war and disaster upon the collectivization of enterprise. This hypothesis might be stated as follows: In periods of crisis, such as war, floods, epidemics, and other disasters, activities hitherto carried on by private enterprise for profit are likely to be collectivized either for the duration of the emergency or permanently. A sixth clue which might be followed up more closely would be that it is easier to collectivize

a newly emerging service than to transfer one which has been in private hands to the public because of the absence in the former case of vested interests. Conversely, it is less difficult to maintain a collectivized service in public hands than to transfer a service from private to public hands. A seventh hypothesis might be that, whenever a given service is irrevocably linked with other services which are of basic importance, the service tends to be collectivized. This is shown to some extent in the hydro-electric power enterprises which are linked with flood control, navigation, and military necessity. As an eighth hypothesis one might raise the question about the relationship of the amount of capital required to the likelihood that an enterprise will be collectivized. Where the amount of capital required is vast, there is greater likelihood that the enterprise will be collectivized than where the amount of capital required is small. A ninth question might be: Do collective enterprises tend to be more or less democratically controlled, more or less responsive to demands of employees, of clients, of the general public, more centralized or decentralized than non-collectivized enterprises? These and other questions will no doubt engage both the contributors and the editor of this volume as they will engage the interest of students of the problem for many years yet to come.

There is very little in the way of generalization bearing upon administration in this volume. Professor Eldridge feels that administrators and experts have had, perhaps more than anyone else, the leading role in the collectivization of enterprises, particularly where these administrators and experts were working for public agencies. Mr. Eldridge is quite noncommittal, however, as to whether collectivized enterprises have peculiar problems of administration and whether they are more or less efficiently administered than non-collectivized enterprises. He realizes further that the relative efficiency of collectivized as over against non-collectivized enterprises is difficult to estimate. He points out that the expediency and the tempo of collectivization have something to do with whether an enterprise can be self-liquidating, such as a municipal water system, whether it must be sustained by taxation, such as our school system, or whether it can actually produce revenues, such as an electric light and power system. There is no adequate and specific treatment of the relative merits of integrating collectivized enterprises on the national, the state, the regional, or the local level, although this problem is held out as one deserving further study. Nor is there any treatment of the problem of personnel in collectivized as distinguished from non-collectivized enterprise. No definitive generalizations are given as to quality of personnel, compensation, or tenure, although in occasional chapters these problems are touched upon.

There can be no doubt about the great significance of the work that Professor Eldridge has undertaken. Considering the trend of the times, the material he has brought together and the questions he has raised about it may be expected to become of increasing public interest in the years to come. What is needed is not merely an enlargement of the scope of these inquiries, greater specificity and comparability in the materials to be assembled, but also greater clarity of definition of the concepts and criteria of evaluation employed. Meanwhile, Professor Eldridge has through this work issued a challenge to the students of administration to improve upon the first attempt that he has made. It is to be hoped that this challenge will be met.

Regulation in a Federal System

By Kenneth C. Cole, University of Washington

REGULATORY ADMINISTRATION, edited by GEORGE A. GRAHAM and HENRY REINING, JR. John Wiley & Sons, Inc., 1943. Pp. 247. $2.75.

PUBLIC administration is a field which has induced a wide variety of responses frc n persons entitled to be called experts in it. Some of this variety is reflected in the volume under review. For example, the section on police administration is heavily underlined with observations indicative of the author's naive confidence in the capacity of modern science to resolve the most basic problems of human behavior clinically. Thus, medical science is credited with having eradicated physical disease by forehanded treatment of its early stages, and social sciences are hopefully looked to for an analogous victory over moral delinquency.

Quite apart from the humorless quality of such favorite "social work" conceptions, one may suggest that there is so much to be done in achieving simple integrity in police administration that it is a waste of time to dwell portentously on possible procedures and techniques to be applied by the police for correcting the psychic maladjustments of the human race. And, while police administration as such can hardly be expected to do much in revolutionizing civic morale, it can, presumably, contribute something toward the solution of the more modest problem of law enforcement.

Of this order of research there are some good examples in the section mentioned. For instance, it is undoubtedly useful to know on the basis of accident figures that the operating cost of the solo motorcycle patrol is actually much greater than that of the motor-car patrol. It is also useful to know that the practice of enlisting the support of special groups in various phases of police work greatly simplifies the problem of law enforcement. But, again, it is necessary to deflate an exposition of police administration (or any kind of administration for that matter) which parades the most obvious truisms as "principles" which presumably have to be learned by the student. Perhaps others will not share the reviewer's feeling in this matter, but to him there is something decidedly jejune about the Vollmer rules for police administration which are faithfully reproduced by his disciple. I do not understand whom Chief Vollmer had it in mind to instruct when he laid down as the first rule in personnel selection that "the best man available should be selected for the job." But if students of public administration have to be taught such innocuous propositions they obviously have a long way to go before they can hope to attain sufficient *savoir faire* to put them on a par with the man in the street.

Fortunately, the volume takes a more sophisticated turn with the next essay. The author of public health regulation apparently conceives his job to be that of outlining the extent to which a professionally defined goal of public health has been and may be achieved *vis à vis* the limiting factor of individual freedom. In doing this there is an acute perception of the points of contact between regulation for the public health and regulation for other objectives. Thus, the close connection between prevention of fraud and protection of health is marked, as is also the close connection between health and general social welfare in such things as the regulation of hours of work.

The author also has something to say about the various techniques of regulation, such as licensing and agreements, and he opines (without, however, committing himself to the desirability of such a course) that regulation may be used "to guarantee the proper ingestion of food elements that are often lacking in the diet." This is, accordingly, a straightforward, if uninspired, summary of the methods and content of public health administration currently exemplified in this country.

Much the same comment should be made on the next essay, on state labor law regulation, although Mr. Reining is not as precise as might be hoped for in explaining his assertion that cooperation is the keynote of modern labor law administration. In this general connection he discusses two different things, i.e., participation by the regulated in making regulations, and the use of public opinion instead of penalties enforceable through the courts as the sanction

for violation of regulations. If the latter is to be called cooperation, it is certainly a very different phenomenon from the former.

Despite their merits neither of the two essays last considered evidences any inclination to deal with questions of policy in the constitutional sense. In other words, they do not set public administration in its context of public law, and without this reference it may be suggested that administration can have little vitality from the standpoint of the student of American government. Ours is a government according to law, which means that the gears of administration must be meshed in some fashion with the gears of constitutional purpose. In short, it is never proper under our system to treat political considerations as if they were extraneous to conclusions about "good" or "efficient" administration. There are no ends of simple managerial efficiency which public administration can set for itself on the analogy of private business enterprise. Such managerial efficiency is only one of the factors which a constitutional system recognizes as relevant in the conduct of public business. What *is* the efficient way to conduct public business cannot be answered without reference to those fundamental concepts of limitation on authority flowing from the general idea of government according to law.

This is the reason why, despite lamentation from some quarters, the best treatments of administrative problems still persist in the use of a legal background or setting for their discussion of procedures and practices. And this is also the reason why the reviewer finds the essays by W. E. Mosher and Wilbur LaRoe on "Public Utility Regulation" and "Regulation of Railroads," respectively, the most meaty. In these essays there is considerable attention paid to the limiting factors of federalism and judicial review as they affect the concept of good administration in these fields. Federalism particularly presents a problem to students of utility regulation because it has become obvious that independent state regulation cannot be tolerated when the activities to be regulated are (practically all of them) conducted across state lines. On the other hand, it is equally obvious that a completely centralized control stemming from the federal executive may have stultifying effects on any political system of divided or distributed power. The only answer which the essays under review seem to have for this problem is that provision should be made for state representation in an advisory capacity before national commissions. And it is noted that joint boards are now widely employed in the name of federal-state cooperation. But, as a matter of fact, the cooperation involved in this sort of arrangement is all on the side of the states, since their officials do not share in the exercise of definite functions. Perhaps the suggestion may be made at this point that state representatives, nominated by such an organization as the National Association of Railroad and Utilities Commissioners, should be appointed to sit on national agencies as full-fleged members. If, for example, four members of the ICC were thus selected, state interests would be articulate in national decision. True, it would not do to deadlock the enforcement of policies outlined by Congress and the President by overloading any national agency with members not subject to the latter's direct or indirect influence. But, with a majority of the members of the commission straight presidential appointees, national policy would still prevail so long as such members voted *en bloc*.

There are, to be sure, a variety of objections which might be raised against such an innovation. But it can do no harm to explore all possibilities in the face of a very real crisis in nation-state relations. As for the problem of judicial review, it may be observed that too many writers on public administration are holding on to clichés about judicial "tyranny" which reflect what is now pretty much a bygone age. I take it that few will now deny that our courts have shown an undue jealousy of administrative decision in the course of protecting private rights of person and property against official encroachment. But this should not cause us to overlook the fact that there is a kind of basic conservatism in the legal institution which constitutional government should endeavor to make use of as a necessary offset to the uncontrolled drive of government officialdom.

In this connection both of the essays last mentioned advert to the proposal of the President's Committee on Administrative Management that the judicial functions of our present boards and commissions be separated from their administrative and legislative functions in order (among other things) that the former should be discharged by personnel independent of executive influence. Neither

Mosher nor LaRoe is enthusiastic about this proposal. They both object on two grounds: first, that all these functions are so interrelated in the activities of boards and commissions that their work would be seriously handicapped by the suggested reform; second, that it would be a mistake to put the administrative and legislative functions of the commissions under the exclusive direction of the President rather than Congress. For my part, I believe the second objection has less weight than the first. I believe it is true that the so-called judicial functions are integral to the work of carrying out policy and that they should be carried on in conjunction with the other activities committed to such bodies as the ICC and the FTC. But I see no great objection to assigning all these activities to the active supervision of the President, if an adequate means of appeal to the regular courts is provided. In other words, I do not conceive the procedurally "judicial" function of these agencies as necessarily judicial in the institutional sense. It may well be employed in the refinement of policy and, as such, belongs on the administrative side. So long, therefore, as this kind of judicial action is not regarded as a substitute for judicial review in the constitutional sense there is no objection to its being carried on by officials responsible to the President.

News of the Society

THE fifth annual meeting of the American Society for Public Administration will be held in conjunction with the annual meetings of the American Economic Association and the American Political Science Association in Washington, D. C., January 20 to 23, 1944.

Since transportation difficulties and restrictions will probably make it impossible for any members to travel to the annual meeting, plans were made to hold it in the city where the greatest possible number could attend without traveling.

Tentative plans are being made to broadcast some of the sessions of the joint meeting, if possible, so that local chapters in other cities may participate.

New Managing Editor

Miss Laverne Burchfield, assistant to the director of the Rural Education Project at the University of Chicago, has been appointed managing editor of *Public Administration Review* to succeed Don K. Price, who is awaiting orders to active service in the United States Naval Reserve. Miss Burchfield, a Ph.D. in political science from the University of Michigan, has been assistant editor of *Social Science Abstracts*, a staff member of the Social and Economic Research Division of the Tennessee Valley Authority, editor of the reports of the President's Committee on Administrative Management, editor for the Advisory Committee on Education, and more recently research associate of Public Administration Service.

Chapter News

THE Southern California Chapter met in Los Angeles, October 19, to discuss "What Is Wrong with the Merit System." The point of view of an operating department head was presented by J. W. Hartman, Assistant County Assessor; of an elective officer by John Anson Ford, member of the County Board of Supervisors; and of an administrative officer in a civil service department by John Steven, personnel officer of the Los Angeles City Schools.

The New York Metropolitan Chapter held a dinner meeting on October 26 at which Commissioner Arthur Flemming of the U. S. Civil Service Commission discussed "The Government's Manpower Problems."

The following officers for 1943-44 were elected:

President—Albert Pleydell, commissioner, New York City Department of Purchase

Vice-President—Commander Samuel H. Ordway, Jr., U.S.N.R., Civilian Personnel Office, U. S. Navy

Members of the Governing Board—

Leona Baumgartner, M.D., director, Bureau of Child Hygiene, New York City Department of Health

L. E. Bevan, director, Agricultural Extension Service, New Jersey

George E. Cohron, senior administrative officer, Field Office, Manhattan 3, Social Security Board

James E. McCabe, administrative officer, New York Regional Office, War Production Board

Charles S. Ascher, regional representative, National Housing Agency, will continue to serve as secretary-treasurer of the New York Metropolitan Chapter.

The Executive Committee of the Philadelphia Society for Public Administration scheduled monthly luncheon meetings during the past year from December 1942 through April 1943, at which local administrators led discussions. Since the attendance ranged from twelve to twenty persons it was possible to discuss topics intimately. Topics discussed and discussion leaders were as follows:

December meeting: "Recruiting Administrators and Technicians for Government War Agencies"

W. Brooke Graves, director of recruiting, Third U. S. Civil Service District

January meeting: "Decentralization of Discretion to Prevent Bottlenecking of Decisions"

J. F. Bogardus, district price executive

February meeting: "The Role of Lawyers in Administrative Agencies"

Paul Bruton, Office of Price Administration

March meeting: "The Relation of Public Administrators to Representative Assemblies"

Frank J. G. Dorsey, regional director of Wage and Hour Division, Department of Labor

April meeting: "The Relation of State and Local Public Administrators to the General Public"

C. W. Tillinghast, Pennsylvania Economy League

The Philadelphia group voted to continue as chairman, Hardy L. Shirley, director of the Allegheny Forest Experiment Station, U. S. Department of Agriculture; and as secretary-treasurer, Raymond S. Short, Department of Political Science, Temple University.

The executive group of the Washington, D. C. Chapter has met to plan a program on the theme of "Bureaucracy—A Diagnosis," comprising four round table meetings patterned after the Forum of the Air, each with two speakers, two interrogators, and a moderator. Tentative titles for the sessions are: (1) Congressmen Look at Bureaucracy, (2) Bureaucrats Look at Congress, (3) Bureaucracy—Self Analyzed, (4) The Responsibility of the 'Bureaucracy' to the Public.

The Chapter announces the following change in officers for the year:

President—Miss Lavinia Engle, regional director, Social Security Board, in place of Emery Olson who has returned to California

1st Vice-President—Robert M. Paige, executive placement officer, Personnel Division, Office of Price Administration

2nd Vice-President—Leland Barrows, executive officer, War Relocation Authority

New member of the Senior Executive Committee—Ward Stewart, deputy director, Division of Foreign Funds Control, Treasury Department

Program Chairman—Henry Reining, National Institute of Public Affairs

Membership Chairman—Elmer Staats, chief budget examiner, Bureau of the Budget

Secretary-Treasurer—Mrs. Kathaleen Arneson, technical advisor, Office of Community War Services, Federal Security Agency

Assistant Secretary-Treasurer—Miss Esther Miller, interne, National Institute of Public Affairs.

Public Administration

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